

Capital Reporting Company
Hearing - Volume VI - 04-27-2010

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BEFORE THE UNITED STATES COPYRIGHT ROYALTY JUDGES
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WASHINGTON, D.C.

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IN THE MATTER OF: :

DIGITAL PERFORMANCE RIGHT IN : Docket No. 2009-1

SOUND RECORDINGS and EPHEMERAL: CRB Webcasting III

RECORDINGS : Volume VI

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Washington, D.C.

Tuesday, April 27, 2010

The following pages constitute the
proceedings held in the above-captioned matter held at
the Library of Congress, Madison Building, 101
Independence Avenue, Southeast, Washington, D.C.,
before Denise M. Brunet, RPR, of Capital Reporting
Company, a Notary Public in and for the District of
Columbia, beginning at 9:33 a.m., when were present on
behalf of the respective parties:

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1 APPEARANCES	1 APPEARANCES (continued):
2	2
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22 (Appearances continued on the next page.)	22
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<p style="text-align: right;">1059</p> <p>1 PROCEEDINGS</p> <p>2 CHIEF JUDGE SLEDGE: Thank you. We'll come</p> <p>3 to order. Mr. Oxenford, your written argument on the</p> <p>4 offer of the deposition of Mr. Lam.</p> <p>5 MR. OXENFORD: Yes, Your Honor. Providing --</p> <p>6 Your Honor, if I may -- a copy of our written comments</p> <p>7 on the statement -- the comments of SoundExchange on</p> <p>8 the question of whether the deposition of Mr. Lam</p> <p>9 should be offered into evidence. This will be filed</p> <p>10 with your offices formally this morning and</p> <p>11 distributed formally through the regular process as</p> <p>12 well.</p> <p>13 CHIEF JUDGE SLEDGE: It has not been filed</p> <p>14 yet?</p> <p>15 MR. OXENFORD: It will be filed this morning.</p> <p>16 CHIEF JUDGE SLEDGE: It has not been filed</p> <p>17 yet?</p> <p>18 MR. OXENFORD: It has not yet been filed.</p> <p>19 That's my understanding.</p> <p>20 CHIEF JUDGE SLEDGE: I'm not encouraging you</p> <p>21 to, but do you have anything you wish to add orally in</p> <p>22 addition to this written argument?</p>	<p style="text-align: right;">1061</p> <p>1 stated yesterday, I fully expected that we would be</p> <p>2 presenting our witnesses in the order that we had</p> <p>3 stated yesterday. Our first witness this morning was</p> <p>4 to be Dianne Lockhart. Ms. Lockhart lives in rural</p> <p>5 Colorado. When we were here yesterday morning, we</p> <p>6 understood her to be on her way to the airport.</p> <p>7 Unfortunately, she had to cross a mountain</p> <p>8 pass and ran into some winter weather and was not able</p> <p>9 to make it to the airport yesterday morning, or</p> <p>10 yesterday at all. She is currently on her way to the</p> <p>11 airport or on a plane to be flying to Washington and</p> <p>12 she will not, unfortunately, arrive until sometime</p> <p>13 this afternoon in Washington.</p> <p>14 We discussed this yesterday with</p> <p>15 SoundExchange. SoundExchange, I believe, has</p> <p>16 authorized us to represent that they have no</p> <p>17 objections to taking her tomorrow morning. We all</p> <p>18 believe that her examination will be very, very short.</p> <p>19 We were shocked, unfortunately, when we left</p> <p>20 the courtroom and went to plan to go to meet with her</p> <p>21 that we found out that she wasn't even in the city as</p> <p>22 of yesterday afternoon.</p>
<p style="text-align: right;">1060</p> <p>1 MR. OXENFORD: The only additional matter,</p> <p>2 Your Honor, is that one of the issues that clearly was</p> <p>3 on the mind of SoundExchange in connection with the</p> <p>4 deposition of Mr. Lam was the payment of royalties by</p> <p>5 Live365. Yesterday SoundExchange received a wire</p> <p>6 transfer of \$2.8 million which we believe to be -- my</p> <p>7 client believes to be the entire amount of the</p> <p>8 royalties, plus interest, and we believe that, to a</p> <p>9 great extent, moots the need of SoundExchange for the</p> <p>10 deposition of Mr. Lam.</p> <p>11 CHIEF JUDGE SLEDGE: You each day find some</p> <p>12 way to astound us with some revelation.</p> <p>13 MR. OXENFORD: I understand that, Your Honor.</p> <p>14 CHIEF JUDGE SLEDGE: But we're all aware that</p> <p>15 that's not evidence, that's not --</p> <p>16 MR. OXENFORD: I understand.</p> <p>17 CHIEF JUDGE SLEDGE: Not something in the</p> <p>18 record and not something we can consider.</p> <p>19 MR. OXENFORD: And I, unfortunately, have</p> <p>20 another preliminary matter, Your Honor. Yesterday</p> <p>21 afternoon when you asked me whether we would be</p> <p>22 presenting our witnesses in the order that we had</p>	<p style="text-align: right;">1062</p> <p>1 CHIEF JUDGE SLEDGE: Some things are beyond</p> <p>2 anyone's control. I'm sure you all have considered</p> <p>3 and eliminated the possibility of stipulating any part</p> <p>4 of her testimony.</p> <p>5 MR. OXENFORD: We did discuss that with</p> <p>6 SoundExchange yesterday afternoon, or yesterday</p> <p>7 evening, and at this point have not been able to reach</p> <p>8 a resolution to that effect.</p> <p>9 CHIEF JUDGE SLEDGE: Thank you. I don't</p> <p>10 think you said, but I inferred from your comments that</p> <p>11 you're ready to start with your second witness?</p> <p>12 MR. OXENFORD: Yes. Dr. Fratrik is here and</p> <p>13 ready to go.</p> <p>14 CHIEF JUDGE SLEDGE: Mr. Handzo, anything</p> <p>15 further on the motion?</p> <p>16 MR. HANDZO: No, Your Honor. We just</p> <p>17 received their pleading, so I haven't had a chance to</p> <p>18 read it yet. I don't think we have anything further</p> <p>19 to add at this time.</p> <p>20 CHIEF JUDGE SLEDGE: We'll recess to consider</p> <p>21 both the matter of the witnesses and the pending</p> <p>22 motion.</p>

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<p>1 (Whereupon, a short recess was taken.)</p> <p>2 CHIEF JUDGE SLEDGE: Thank you. We'll come</p> <p>3 to order.</p> <p>4 All right. The judges have reviewed the</p> <p>5 written arguments presented by the parties on the</p> <p>6 motion to admit the deposition of Mark Lam,</p> <p>7 SoundExchange Trial Exhibit 13. And the response by</p> <p>8 Live365 addresses the objection because it is</p> <p>9 inappropriate to be admitted in the cross-examination</p> <p>10 of Johnie Floater, and that Johnie Floater is an</p> <p>11 improper witness to sponsor the exhibit.</p> <p>12 The offer of the exhibit, which is the</p> <p>13 deposition, is not made in that manner. The offer is</p> <p>14 made as evidence not related to the testimony of</p> <p>15 Johnie Floater or on behalf of Johnie Floater. The</p> <p>16 judges find that the facts under the testimony of Mark</p> <p>17 Lam fit within the regulation permitting evidence for</p> <p>18 good cause shown under 803(b)(6)(C)(xi), and this</p> <p>19 arises as a result of the ambush of listing Mark Lam</p> <p>20 as a witness to testify on April 26th and then, as</p> <p>21 that day began, announcing that Mr. Lam is withdrawn</p> <p>22 as a witness and not going to testify, and further,</p>	<p>1 marked restricted and subject to the protective order</p> <p>2 in this proceeding.</p> <p>3 JUDGE WISNIEWSKI: I'm sorry. I didn't quite</p> <p>4 catch that. Could you repeat that.</p> <p>5 MR. OXFORD: Certain parts of the</p> <p>6 deposition transcripts were marked restricted and</p> <p>7 subject to the --</p> <p>8 JUDGE WISNIEWSKI: Oh, you're just referring</p> <p>9 to the deposition?</p> <p>10 MR. OXFORD: Yes.</p> <p>11 JUDGE WISNIEWSKI: Thank you.</p> <p>12 CHIEF JUDGE SLEDGE: Any response?</p> <p>13 MR. DeSANCTIS: No objection to that motion,</p> <p>14 Your Honor.</p> <p>15 CHIEF JUDGE SLEDGE: Without objection, the</p> <p>16 motion is granted. All right.</p> <p>17 MR. MacDONALD: Your Honors, Live365 calls</p> <p>18 its next witness, Dr. Mark Fratrik.</p> <p>19 WHEREUPON,</p> <p>20 MARK FRATRIK,</p> <p>21 called as a witness, and after having been first sworn</p> <p>22 by the chief judge, was examined and testified as</p>
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<p>1 based on the representation by Live365 that the direct</p> <p>2 case of Live365 is based on the full and open</p> <p>3 financial records of Live365 which have not been</p> <p>4 restricted or redacted in any way, and offering those</p> <p>5 records to establish the webcaster costs and revenues</p> <p>6 that are in the marketplace.</p> <p>7 The large part of the testimony in the</p> <p>8 written direct statement and in the deposition of Mark</p> <p>9 Lam address those financial conditions of Live365</p> <p>10 which were represented as to be presented to the</p> <p>11 judges in this case. The exhibit is admitted.</p> <p>12 (SoundExchange Trial Exhibit Number 13 was</p> <p>13 received into evidence.)</p> <p>14 CHIEF JUDGE SLEDGE: Excuse me just a minute.</p> <p>15 The request to change the order of witnesses</p> <p>16 and to have Ms. Lockhart testify tomorrow is granted,</p> <p>17 and we'll proceed with the remaining witness.</p> <p>18 MR. OXFORD: Just one point, Your Honor, in</p> <p>19 light of your ruling. Certain portions of the</p> <p>20 deposition were marked restricted under the protective</p> <p>21 order, and we would ask that those portions of the</p> <p>22 deposition that were marked restricted continue to be</p>	<p>1 follows:</p> <p>2 DIRECT EXAMINATION</p> <p>3 BY MR. MacDONALD:</p> <p>4 Q Good morning, Dr. Fratrik.</p> <p>5 A Good morning.</p> <p>6 Q Could you please state and spell your name</p> <p>7 for the record.</p> <p>8 A My name is Mark Robert Fratrik,</p> <p>9 F-R-A-T-R-I-K.</p> <p>10 Q And where are you employed, Dr. Fratrik?</p> <p>11 A I'm employed at BIA Kelsey Group.</p> <p>12 Q What does BIA Kelsey Group do?</p> <p>13 A BIA Kelsey is a research and financial and</p> <p>14 strategic consulting firm for the media and</p> <p>15 communications industries.</p> <p>16 Q And What is your title at BIA Kelsey?</p> <p>17 A I am vice president at BIA Kelsey Group.</p> <p>18 Q Would you please summarize your educational</p> <p>19 background.</p> <p>20 A I received a BA in economics, an honors</p> <p>21 degree in economics and a dual major in mathematics</p> <p>22 from the State University of New York at Binghamton</p>

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1067	<p>1 in 1976. I received a master's of science in</p> <p>2 economics from Texas A&M University in 1978, and I</p> <p>3 received a Ph.D. in economics from Texas A&M</p> <p>4 University in 1981.</p> <p>5 Q Were there specific areas of economics that</p> <p>6 you focused on in your graduate studies?</p> <p>7 A Yes. I had two fields of specialization,</p> <p>8 industrial organization and regional economics.</p> <p>9 Q And what do the disciplines of industrial</p> <p>10 organization and regional economics entail?</p> <p>11 A Industrial organization deals with the</p> <p>12 economics of individuals, firms, markets and</p> <p>13 industries as they evolve. Regional economics deal</p> <p>14 with the economics of specific areas, regions of the</p> <p>15 country, as well as the transportation, distributional</p> <p>16 costs that are involved in everyday business.</p> <p>17 Q Dr. Fratrik, would you please summarize your</p> <p>18 employment history, please.</p> <p>19 A In September 1980, I became a staff economist</p> <p>20 at the Federal Trade Commission, where I was</p> <p>21 specializing in antitrust economics as well as</p> <p>22 conducting some industry studies.</p>	1069	<p>1 radio and TV industry and competitive media.</p> <p>2 Q And what surveys did you conduct,</p> <p>3 Dr. Fratrik?</p> <p>4 A It was an annual survey of all commercial</p> <p>5 radio and television stations, separate surveys for</p> <p>6 radio and television, asking about various revenue</p> <p>7 sources, expenses by departments and certain line item</p> <p>8 expenses and, thus, you obtain some profitability as a</p> <p>9 result of that.</p> <p>10 Q Dr. Fratrik, I just want to remind you that a</p> <p>11 court reporter is transcribing your testimony. So if</p> <p>12 you want to just keep a slow pace, that would be - I'm</p> <p>13 sure she would appreciate it.</p> <p>14 A Thank you. I apologize.</p> <p>15 Q In connection with the annual survey for</p> <p>16 radio, what was your involvement during your time at</p> <p>17 the NAB?</p> <p>18 A Well, even at the very beginning, I was</p> <p>19 responsible for the actual survey instrument, the</p> <p>20 collection of the data. The data was sent to an</p> <p>21 accounting firm for confidentiality, but we had the</p> <p>22 opportunity to analyze the data, and we generated the</p>
1068	<p>1 Q And while at the Federal Trade Commission,</p> <p>2 were you -- what specific studies were you involved</p> <p>3 in?</p> <p>4 A I dealt with some studies on the pricing</p> <p>5 behavior of firms in various industries as well as</p> <p>6 some of their marketing and distributional questions.</p> <p>7 Q And what did you do after the Federal Trade</p> <p>8 Commission?</p> <p>9 A In February 1985, I became director of</p> <p>10 financial and economic research at the National</p> <p>11 Association of Broadcasters. In 1991, I was promoted</p> <p>12 to vice president in charge of the research and</p> <p>13 planning department at the National Association of</p> <p>14 Broadcasters.</p> <p>15 Q At the National Association of Broadcasters,</p> <p>16 were you involved in publishing any industry reports</p> <p>17 or studies?</p> <p>18 A Yes. I was -- one of my main roles at the</p> <p>19 National Association of Broadcasters was to supervise</p> <p>20 the annual financial survey of all commercial, radio</p> <p>21 and television stations. I also was involved in lots</p> <p>22 of other studies about the competitiveness of the</p>	1070	<p>1 reports that many broadcasters used to compare</p> <p>2 themselves with.</p> <p>3 Q Was there anything else that you did at the</p> <p>4 NAB?</p> <p>5 A Yeah. As I said, I did several -- a lot of</p> <p>6 studies on the competitiveness of radio and television</p> <p>7 stations and -- as it would be affected by various</p> <p>8 regulatory changes that were being proposed.</p> <p>9 Q Did any of your studies at the NAB examine</p> <p>10 operating margins?</p> <p>11 A Yes. I recall two that dealt specifically</p> <p>12 with that. One had to deal with the impact of the</p> <p>13 introduction of the satellite audio radio service in</p> <p>14 the mid-'90s, on the impact of financial viability of</p> <p>15 radio stations.</p> <p>16 Another one that I recall had to deal with</p> <p>17 the financial viability, the financial picture of</p> <p>18 radio stations as it relates to possible deregulation</p> <p>19 of local ownership rules.</p> <p>20 Q When did you leave the NAB, Dr. Fratrik?</p> <p>21 A I left the NAB at the conclusion of the year</p> <p>22 2000.</p>

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<p style="text-align: right;">1071</p> <p>1 Q And how many -- approximately how many years 2 were you there? 3 A I was there nearly 16 years. 4 Q Where did you go after the NAB? 5 A I went directly to BIA. 6 Q And what are your responsibilities at BIA? 7 A At BIA I supervise the research efforts that 8 we have, an extensive research program of the radio, 9 television and newspaper industries. We do an annual 10 survey of all commercial radio and television stations 11 and local newspapers. 12 I'm also involved in valuation studies of 13 stations as well as other financial and strategic 14 consulting projects. I'm still heavily involved in 15 lots of analyses of the radio industry and TV industry 16 as it's affected by regulatory policy. 17 Q When you said valuations of stations, could 18 you provide more detail about what those valuations 19 entailed? 20 A One of the main -- long history at BIA is 21 that we conduct values of radio and television 22 stations either for financing purposes or for tax or</p>	<p style="text-align: right;">1073</p> <p>1 Q Dr. Fratrik, have you done any teaching? 2 A Yes, I have. 3 Q What have you taught? 4 A I've taught for seven-and-a-half years at the 5 Johns Hopkins University. 6 Q And what class specifically? 7 A It was a class called the political economy, 8 a mass communications. It was part of a master's 9 level program called communications in the 10 contemporary society that Johns Hopkins has. 11 Q And does this mass communications class 12 involve any examination of revenue and/or cost 13 structures? 14 A Yes. It explains some economic principles to 15 the master's level students, talking about some 16 industrial organization concepts. And it also looked 17 at individual -- various media that comprise today's 18 wider media marketplace. 19 Q And what specific industries does this class 20 cover? 21 A We deal -- I've dealt with radio and 22 television, newspapers, magazines, recording industry,</p>
<p style="text-align: right;">1072</p> <p>1 financial accounting purposes, such as -- one aspect 2 of -- that's increasingly become very necessary is 3 radio stations have to -- many radio companies have to 4 value their intangible assets, including the FCC 5 license, every year. 6 Q And approximately how many times have you had 7 to determine the value of the FCC license? 8 A I think around 40 to 60 different instances. 9 Q And can you provide a -- just a thumbnail 10 sketch of what's entailed in valuing a FCC license? 11 A Yeah. The -- it's pretty straightforward. 12 It's what called a Greenfield approach. You assume 13 that a station turns on at the date of what you're 14 valuing, let's say April 1st. And you -- you estimate 15 the revenues and costs of the station over a time 16 period. You determine the value of that -- what we 17 call a start-up or sometimes referred to as a stick. 18 And then you subtract out the value of the tangible 19 asset because what remains left -- the only other 20 asset that the radio station has is the FCC license 21 because we're assuming that they start up new 22 operations.</p>	<p style="text-align: right;">1074</p> <p>1 motion picture industry, the Internet industry, 2 satellite radio and satellite television. 3 Q Does BIA publish any reports that you are 4 responsible for? 5 A Yes. We publish a quarterly compendium of 6 both radio and television markets and an annual 7 analysis of newspaper by markets where we profile 300 8 radio markets as well as 210 television markets. 9 Q And what is your responsibility in connection 10 with the compendium on the radio markets that's 11 published by BIA? 12 A I supervise the entire process, involved 13 heavily in the estimation of the revenue for the 14 existing radio and television stations, as well as the 15 forecasts for the individual markets. 16 Q Dr. Fratrik, do you speak on panels? 17 A Yes. I speak at various industry panels. In 18 fact, just two weeks ago I was at the recent National 19 Association of Broadcasters annual conference where I 20 talked about the radio industry, the revenues online 21 and over-the-air. 22 Q Have you testified in any regulatory</p>

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1075	<p>1 proceedings in the past?</p> <p>2 A Yes. I've testified two times in regulatory</p> <p>3 proceedings.</p> <p>4 Q Besides testifying, have you been involved in</p> <p>5 regulatory proceedings in other capacities?</p> <p>6 A Yes. As I mentioned, I did a lot of</p> <p>7 analyses, both while I was at the NAB and since then,</p> <p>8 of various impacts on the financial profile of radio</p> <p>9 and television stations as potential regulatory</p> <p>10 changes are decided upon at the FCC.</p> <p>11 Q Have you testified before the copyright</p> <p>12 arbitration royalty panel before?</p> <p>13 A Yes, I did.</p> <p>14 Q And what was the subject matter of that</p> <p>15 testimony?</p> <p>16 A The subject matter of the court proceedings</p> <p>17 was the distribution of distant signal fees that are</p> <p>18 collected from cable systems to be distributed to the</p> <p>19 program owners, copyright owners of the programs that</p> <p>20 are aired on those distant signals.</p> <p>21 Q Dr. Fratrik, how many times have you been</p> <p>22 retained as an expert witness in a judicial</p>	1077	<p>1 recess to consider this proffer.</p> <p>2 (Whereupon, a short recess was taken.)</p> <p>3 CHIEF JUDGE SLEDGE: Thank you. We'll come</p> <p>4 to order. The proffer is accepted.</p> <p>5 MR. MacDONALD: Thank you, Your Honor. May I</p> <p>6 approach the bench and the witness, Your Honor?</p> <p>7 CHIEF JUDGE SLEDGE: Yes.</p> <p>8 MR. MacDONALD: May I proceed, Your Honor?</p> <p>9 BY MR. MacDONALD:</p> <p>10 Q Dr. Fratrik, I've handed you what we've</p> <p>11 marked for identification as Live365 Trial Exhibit 30.</p> <p>12 Do you recognize this document, Dr. Fratrik?</p> <p>13 A Yes, I do.</p> <p>14 Q And is this your corrected and amended</p> <p>15 testimony?</p> <p>16 A Yes, it is.</p> <p>17 Q Was this report prepared by you?</p> <p>18 A Yes, it was.</p> <p>19 Q Can you please turn to page 45. Are you</p> <p>20 there, Dr. Fratrik?</p> <p>21 A Yes, I am.</p> <p>22 Q Is that your signature?</p>
1076	<p>1 proceeding?</p> <p>2 A Nine.</p> <p>3 Q How many?</p> <p>4 A Nine.</p> <p>5 Q Of those nine times, have you ever been</p> <p>6 determined not to be qualified as an expert witness?</p> <p>7 A No, I have not.</p> <p>8 MR. MacDONALD: Your Honors, at this time, I</p> <p>9 would like to proffer Dr. Fratrik as an expert in</p> <p>10 industrial organization with an expertise in the</p> <p>11 broadcast and media industries.</p> <p>12 CHIEF JUDGE SLEDGE: Any objection to the</p> <p>13 proffer?</p> <p>14 MR. HANDZO: No objection, Your Honor.</p> <p>15 CHIEF JUDGE SLEDGE: Questions from the</p> <p>16 bench?</p> <p>17 MR. MacDONALD: Thank you, Your Honor. May I</p> <p>18 approach the bench and the witness with --</p> <p>19 CHIEF JUDGE SLEDGE: You're a bit premature.</p> <p>20 I haven't done anything.</p> <p>21 MR. MacDONALD: Sorry, Your Honor.</p> <p>22 CHIEF JUDGE SLEDGE: Be thankful. We'll</p>	1078	<p>1 A Yes, it is.</p> <p>2 Q In preparing for your testimony today, was</p> <p>3 there anything that you felt needed to be corrected</p> <p>4 from your amended testimony?</p> <p>5 A Yes. On page 24, the first full line, at the</p> <p>6 end of that first full sentence, it should be .0285.</p> <p>7 Q Is there anything else, Dr. Fratrik?</p> <p>8 A Yes. On page 34 in the second full</p> <p>9 paragraph, the last sentence in that second full</p> <p>10 paragraph, it should read, "have generated close to</p> <p>11 1.3 million in sales from music and MP3 downloads."</p> <p>12 Page 40 in the first full paragraph at the</p> <p>13 end of that first sentence, the percentage should be</p> <p>14 16.92 percent.</p> <p>15 There are other references to Mr. Lam's</p> <p>16 testimony that's been blacked out in other pages.</p> <p>17 Q Dr. Fratrik, do any of these changes that you</p> <p>18 just testified to affect any of your calculations in</p> <p>19 your report?</p> <p>20 A No, they do not.</p> <p>21 Q Dr. Fratrik, do you see that there are</p> <p>22 numerous numbered tabs along with your report</p>

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<p>1079</p> <p>1 numbered 1 through 10? 2 A Yes. 3 Q Can you please turn to the document under 4 tab 1? 5 A I'm there. 6 Q What is this document? 7 A This is my curriculum vitae. 8 Q And is this a current version of your 9 curriculum vitae? 10 A Yes, it is. 11 Q What is the document under tab 2? 12 A The document under tab 2 is a title page of 13 Investing in Radio Market Report 2009, first edition. 14 This is the report that I made reference to, earlier 15 that I supervised in terms of a compendium of radio 16 markets. And attached to that is a slide from that 17 publication which provides radio station revenues 2003 18 through 2013. 19 Q Did you have any role in preparing the 20 particular slide that you were referring to on page 2 21 of Exhibit 2 of your report? 22 A Yes, I'm responsible for generating those</p>	<p>1081</p> <p>1 A This is a report by eMarketer on the radio 2 industries, their trends on over-the-air and online 3 revenues. 4 Q And why did you include this document with 5 your report? 6 A I utilized some of the information on this 7 report in my testimony. 8 Q Dr. Fratrik, what's the document under tab 6? 9 JUDGE WISNIEWSKI: I'm not quite 10 understanding. On these last two exhibits, did you 11 use them in your modeling or just used them generally 12 in your testimony? 13 THE WITNESS: Your Honor, the Credit Suisse, 14 I utilized information on that for my evaluation of 15 the webcasting industry in my section B, I believe it 16 is, in my report when I evaluate how the webcasting 17 industry is doing. 18 And the same thing with the eMarketer. I 19 utilized that in some of my review of recent history 20 in the webcasting industry. 21 JUDGE WISNIEWSKI: Okay. Thank you. 22 BY MR. MacDONALD:</p>
<p>1080</p> <p>1 market and industry-wide estimates that are reported 2 in that graph. 3 Q Let's turn to the document that's under 4 tab 3, Dr. Fratrik. What is this document? 5 A This is the Accustream annual report on 6 Internet radio for 2008. 7 Q Why did you include this document with your 8 report? 9 A I utilized some of the data that is reported 10 in this report in my modeling. 11 Q Let's turn to the document under tab 4. What 12 is this document, Dr. Fratrik? 13 A This is a report by Credit Suisse of the U.S. 14 advertising outlook for 2009 which includes 15 information on Internet radio. 16 Q And why did you include this document with 17 your report? 18 A I utilized some of the results of this 19 report -- that's included in this report in my 20 testimony. 21 Q Let's turn to the document under tab 5. What 22 is this document, Dr. Fratrik?</p>	<p>1082</p> <p>1 Q Dr. Fratrik, turning to the document under 2 tab 6, what is this document? 3 A This is an annual report that Arbitron and 4 Edison Research do. It's titled, "The Infinite Dial 5 2009." 6 Among other things, it reviews information 7 about the online listening -- listenership. 8 Q Why did you include this document with your 9 report? 10 A Like some of the other exhibits, I utilized 11 this in terms of evaluating the webcasting industry 12 and it's included in my testimony. 13 Q Let's turn to the document under tab 7. What 14 is this document, Dr. Fratrik? 15 A This is a report by JPMorgan from April of 16 2008 where they analyze the radio broadcasting 17 industry, both online and Internet radio listening. 18 And I utilized this, once again, when I evaluate the 19 recent history of the webcasting industry. 20 Q Let's turn to the document under tab 8. What 21 is this document, Dr. Fratrik? 22 A This is part of the ZenithOptimedia</p>

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<p>1083</p> <p>1 advertising expenditure forecast which was issued in 2 July of 2009. And this document -- I used the 3 industry estimates from ZenithOptimedia in one of my 4 models. 5 Q And let's turn to the document under tab 9. 6 What is this document, Dr. Fratrik? 7 A This is the -- a Live365 document that 8 details their U.S. Internet radio network revenues as 9 well as the number of aggregate total hours -- 10 aggregate tuning hours for those U.S. royalty-bearing 11 listening. 12 Q Does the financial data recorded in this 13 document cover Live365's full fiscal year for 2009? 14 A It does, as well as the three previous fiscal 15 years. 16 Q Did you do anything to verify the data 17 provided in this document under tab 9? 18 A I talked with people at Live365 about the 19 data. 20 Q To whom did you talk? 21 A I talked to a gentleman by the name of 22 Yue-Shin Ho, who is a financial analyst for Live365.</p>	<p>1085</p> <p>1 provided in this document? 2 A I talked with those three individuals -- the 3 two individuals -- Ms. Hu and Mr. Ho about this and 4 just generally discussed these data. 5 Q And why did you include this document in 6 connection with your report? 7 A It's important to generate the revenue 8 estimates that I later use in my models. 9 Q Are each of these documents under tabs 1 10 through 10 true and correct copies of documents you 11 relied upon in connection with preparing your report? 12 A Yes, they are. 13 MR. MacDONALD: Your Honor, I would like to 14 offer Live365 Trial Exhibit 30 into evidence. 15 CHIEF JUDGE SLEDGE: Any objection to 16 Exhibit 30? 17 MR. HANDZO: Yes, Your Honor. Your Honor, 18 SoundExchange objects because, under Federal Rule of 19 Evidence 702, in order for the court to accept an 20 expert report, it has to be able to find that the 21 report is based on sufficient facts or data and that 22 the witness has applied the principles and methods</p>
<p>1084</p> <p>1 I talked to a woman by the name of Melodie Hu, who is 2 in charge of accounting at Live365. And I 3 specifically talked to Mr. Johnie Floater who is in 4 charge of the advertising sales at Live365 on, 5 particularly, the advertising revenues for the U.S. 6 royalty-bearing aggregate tuning hours. 7 Q Why did you include this document in 8 connection with your report? 9 A I needed these data so as to try to analyze 10 the Live365 costs and -- in terms of generating my 11 model. 12 Q And finally, Dr. Fratrik, turning to the 13 document under tab 10, what is this document? 14 A This is the historical operating income 15 statement from Live365 detailing all of their revenues 16 and expenses. 17 Q Does the financial data presented in this 18 document under tab 10 cover Live365's full fiscal year 19 2009? 20 A As well as fiscal -- the three fiscal years 21 prior to that. 22 Q And did you do anything to verify the data</p>	<p>1086</p> <p>1 reliably to the facts. And that's a function that the 2 court has to test that. 3 We would submit that, under the particular 4 circumstances of this case, your ability to do that 5 has been severely impaired by the withdrawal of 6 Mr. Lam. Not only can you not test the reliability of 7 this for the purposes of admissibility, but also, with 8 respect to admitting it, to be able to weigh what 9 weight you will give to it. 10 Lam is particularly important here. And on 11 at least ten occasions in Dr. Fratrik's written direct 12 testimony, he explicitly references Lam's written 13 direct testimony as providing the factual support. 14 Although he's now testified that he talked to somebody 15 named Mr. Ho and Mr. Ha [sic], that's not what he says 16 in his testimony. In his testimony he says this came 17 from Lam. 18 And specifically in footnote 27, which has 19 now been redacted out of his latest version of his 20 testimony, he says, "My analyses of Live365's revenues 21 and expenses are based on Lam Exhibits 4 and 5." 22 Of course, now Mr. Lam is not here to explain</p>

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<p style="text-align: right;">1087</p> <p>1 it.</p> <p>2 The other thing that I think is critical here</p> <p>3 is that, in Dr. Fratrik's analysis, what he does is he</p> <p>4 excludes half of Live365's business. He excludes the</p> <p>5 broadcaster part of the business, what he calls the</p> <p>6 broadcaster part, and then allocates costs between the</p> <p>7 broadcaster part and the webcaster part. That is</p> <p>8 something that Mr. Lam was in a position to testify</p> <p>9 about and no other witness is.</p> <p>10 Mr. Floater wasn't able to address that. In</p> <p>11 fact, he explicitly said the broadcast side of the</p> <p>12 business, not what I do, not what I know, and he</p> <p>13 really couldn't answer questions about that.</p> <p>14 Mr. Floater also said, well, I don't know anything</p> <p>15 about Lam Exhibits 4 and 5, which is what Dr. Fratrik</p> <p>16 based his financial analysis on.</p> <p>17 And so where we find ourselves is with an</p> <p>18 expert who relied very heavily on Mr. Lam, and then</p> <p>19 Mr. Lam being withdrawn at the 11th hour. And the</p> <p>20 problem is not just that Mr. Lam was withdrawn. The</p> <p>21 problem is also that Mr. Lam was withdrawn when he</p> <p>22 was, at a point where we finished discovery. If we</p>	<p style="text-align: right;">1089</p> <p>1 experts are entitled to rely on hearsay if it's</p> <p>2 reliable. Dr. Pelcovits, for example, relied on</p> <p>3 contracts. We didn't put on witnesses from every one</p> <p>4 of the record companies, but it's important to note we</p> <p>5 did put on record company witnesses. We did bring in</p> <p>6 Mr. McCrady who was able to testify about the</p> <p>7 background for those contracts. We did bring in</p> <p>8 Mr. Kooker who knew the finances. So we did have an</p> <p>9 opportunity for cross, if there was any, on those</p> <p>10 subjects.</p> <p>11 We don't have that opportunity here. As I</p> <p>12 say, I don't think that the ability to put in</p> <p>13 Mr. Lam's deposition, though helpful, entirely solves</p> <p>14 the problem. So for that reason, we do object to the</p> <p>15 admission of this exhibit.</p> <p>16 JUDGE ROBERTS: Mr. Handzo, I don't hear you</p> <p>17 saying that you necessarily lack the underlying</p> <p>18 documents to attempt to impeach the testimony of</p> <p>19 Dr. Fratrik, but I hear what you're saying is you</p> <p>20 don't have a belief that will allow those to be</p> <p>21 admitted; is that correct?</p> <p>22 MR. HANDZO: It's my expectation that there</p>
<p style="text-align: right;">1088</p> <p>1 wanted -- for example, if we had known that Mr. Lam</p> <p>2 wasn't going to be around to begin with, we might, for</p> <p>3 example, have taken a 30(b)(6) deposition or something</p> <p>4 like that. But we didn't have that opportunity</p> <p>5 because we didn't know it was going to play out this</p> <p>6 way.</p> <p>7 Now, I will say that I think the court's</p> <p>8 decision to admit Mr. Lam's deposition on</p> <p>9 SoundExchange's motion does take some steps to address</p> <p>10 the problem, and I do acknowledge that. But it</p> <p>11 doesn't completely solve the problem. For one thing,</p> <p>12 because Mr. Lam isn't here to assess his credibility;</p> <p>13 for another thing, there are documents that we would</p> <p>14 have wanted to get in through Mr. Lam that we're now</p> <p>15 not going to be able to get in. Mr. DeSanctis tried with</p> <p>16 Mr. Floater, and wasn't successful. Their balance</p> <p>17 sheet, for example, some of the websites which --</p> <p>18 again, documents that we think would have gone to</p> <p>19 challenge Dr. Fratrik's analysis, but we don't have.</p> <p>20 Now, one other thing that I should say is</p> <p>21 that, in Live365's response to our motion to admit</p> <p>22 Mr. Lam's testimony, they point out correctly that</p>	<p style="text-align: right;">1090</p> <p>1 are documents I will not be able to get admitted</p> <p>2 because I doubt that he's seen them and knows them.</p> <p>3 JUDGE ROBERTS: But you already have the</p> <p>4 documents. So there is no question here --</p> <p>5 MR. HANDZO: I have the -- I do have the</p> <p>6 documents that we would have used with Mr. Lam, yes.</p> <p>7 CHIEF JUDGE SLEDGE: Any response?</p> <p>8 MR. MacDONALD: Yes, Your Honor. Under</p> <p>9 Federal Rule of Evidence 703 -- and I'll read it --</p> <p>10 "If of a type reasonably relied upon by experts in the</p> <p>11 particular field in forming opinions or inferences</p> <p>12 upon the subject, the facts or data need not be</p> <p>13 admissible in evidence in order for the opinion or</p> <p>14 inference to be admitted."</p> <p>15 So while Mr. Handzo does correctly cite to</p> <p>16 Rule 702, 703, which is titled "Bases of opinion</p> <p>17 testimony by experts," I think, speaks to the exact</p> <p>18 subject that Mr. Handzo was referring to.</p> <p>19 As Mr. Handzo further acknowledged, Mr. Lam's</p> <p>20 deposition is now in evidence, and SoundExchange's</p> <p>21 counsel had every opportunity to ask Mr. Lam and, in</p> <p>22 fact, did ask Mr. Lam at his deposition about</p>

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<p style="text-align: right;">1091</p> <p>1 financial documents with respect to Live365, the same 2 documents that, in fact, Mr. -- Dr. Fratrik relied 3 upon. 4 Dr. Fratrik's deposition occurred prior -- 5 approximately two weeks prior to Mr. Lam's deposition. 6 And so SoundExchange's counsel had full knowledge of 7 all the information that Dr. Fratrik relied upon in 8 connection with his report, including any testimony 9 that Dr. -- sorry, that Mr. Lam provided, and had the 10 basis to discover that information at Mr. Lam's 11 deposition. 12 In addition, Your Honor, I think that what 13 Mr. Handzo is really objecting to goes to the weight 14 of how much Your Honors put consideration into 15 Dr. Fratrik's opinions and testimony, not to the 16 admissibility of his testimony. 17 And further, as Mr. Handzo has pointed out, 18 Dr. Pelcovits relied upon many, many, contracts. 19 There was only one knowledgeable witness that could 20 testify about those contracts, and that was 21 Mr. McCrady. Mr. Kooker had no knowledge about the 22 negotiations with respect to any of Sony Music's</p>	<p style="text-align: right;">1093</p> <p>1 rebuttal witness on any of those documents that were 2 not admitted to the extent that that particular 3 witness has sufficient basis to provide any testimony 4 on those documents that were not admitted. 5 CHIEF JUDGE SLEDGE: In addition, I believe 6 you just committed yourself not to object to those 7 exhibits in cross-examination of this witness the way 8 you presented as to why his -- this written direct 9 statement should be admitted on the basis that the 10 documents were available and could be used to impeach 11 the testimony of Mr. Lam. And with this witness 12 relying on that testimony and records, then you would 13 not object to the admission of those documents and 14 impeaching during cross-examination of this witness. 15 MR. MacDONALD: Your Honor, I would reserve 16 objections to any documents that fall outside of the 17 scope of Dr. Fratrik's direct testimony, either 18 written or oral. 19 CHIEF JUDGE SLEDGE: Or what he relied upon 20 in making his testimony? 21 MR. MacDONALD: Correct, Your Honor. 22 CHIEF JUDGE SLEDGE: We'll consider it.</p>
<p style="text-align: right;">1092</p> <p>1 contracts. And I note, Your Honor, that no witnesses 2 from the other two major record labels were proffered 3 by SoundExchange. 4 So I'm not exactly sure how Mr. Handzo has 5 standing to object here when his own witness did not 6 have any factual witnesses to support their -- the 7 contracts that Dr. Pelcovits relied upon. 8 JUDGE WISNIEWSKI: Mr. MacDonald, are you 9 suggesting that if Mr. Handzo were to provide an 10 expert witness on rebuttal using the documents that 11 were not admitted into evidence yesterday, that would 12 not be a problem because that would be similar to 13 what's going on here? 14 MR. MacDONALD: I'm not exactly sure, Your 15 Honor, which -- what documents are you referring to? 16 The documents that we went over yesterday that were 17 not admitted into evidence? 18 JUDGE WISNIEWSKI: That's right. Financial 19 documents from Live365. Take your balance sheet, for 20 example. 21 MR. MacDONALD: Yes, Your Honor, I think that 22 is correct. I think SoundExchange could put on a</p>	<p style="text-align: right;">1094</p> <p>1 (Whereupon, a short recess was taken.) 2 CHIEF JUDGE SLEDGE: Thank you. We'll come 3 to order. Dr. Fratrik, I have to admit we had 4 additional pause on considering this motion in light 5 of your testimony that you relied on the information 6 behind tab 6 which is entitled "The Infinite Dial," 7 and obviously, a dial cannot be infinite. And so with 8 such an erroneous or careless label, it was a matter 9 of concern to me. 10 But in light of the statements made by 11 Mr. MacDonald and the exchanges on the admissibility 12 of this matter, the exhibit is admitted and the 13 objection is overruled. 14 (Live365 Trial Exhibit Number 30 was received 15 into evidence.) 16 MR. MacDONALD: Thank you, Your Honor. 17 BY MR. MacDONALD: 18 Q Dr. Fratrik, what was the scope of your 19 retention in this matter? 20 A I was asked to review the recent history of 21 the webcasting industry since the Webcasting II 22 decision had been submitted, as well as to determine a</p>

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1095	<p>1 reasonable royalty rate for the digital sound</p> <p>2 recording performance license.</p> <p>3 Q What did you do to prepare for your written</p> <p>4 testimony?</p> <p>5 A Well, I reviewed the Webcasting II decision.</p> <p>6 I reviewed many of the --</p> <p>7 JUDGE WISNIEWSKI: Dr. Fratrik, could you be</p> <p>8 more specific? Which Webcasting II decision?</p> <p>9 THE WITNESS: I actually read the CRB</p> <p>10 decision, and I also read the appellate court</p> <p>11 decision.</p> <p>12 JUDGE WISNIEWSKI: Thank you.</p> <p>13 THE WITNESS: I read the experts on both</p> <p>14 sides for Webcasting II. I read several industry</p> <p>15 reports about the webcasting industry. I'm frequently</p> <p>16 reading industry trade press articles that have some</p> <p>17 references to the webcasting industry. And I talked</p> <p>18 to people at Live365 about the challenges that they</p> <p>19 face in the webcasting industry.</p> <p>20 BY MR. MacDONALD:</p> <p>21 Q In preparing your report, were you applying a</p> <p>22 particular standard?</p>
1096	<p>1 A Yes. I wanted to get a royalty rate that</p> <p>2 would mirror the ending of a negotiation between a</p> <p>3 willing buyer and a willing seller.</p> <p>4 Q Do you believe your overall rate proposal</p> <p>5 reflects what a willing buyer and a willing seller</p> <p>6 would agree to?</p> <p>7 A Yes, I do.</p> <p>8 Q Dr. Fratrik, I'd like to turn your attention</p> <p>9 to page 11. Under the heading "Recent history of the</p> <p>10 commercial webcasting industry" -- are you there,</p> <p>11 Dr. Fratrik?</p> <p>12 A Yes, I am.</p> <p>13 Q Why were you looking at the recent history of</p> <p>14 the webcasting industry?</p> <p>15 A Well, in establishing a rate going from 2011</p> <p>16 through 2015, I wanted to get a sort of good</p> <p>17 understanding of where the webcasting industry is and</p> <p>18 how well it had done since the recent decision in</p> <p>19 Webcasting II. So I looked at some of the recent</p> <p>20 information from the various industry reports and</p> <p>21 contrasted that with the projections that were made by</p> <p>22 many of the experts and other industry trade crafts at</p>
1097	<p>1 that time of Webcasting II decision.</p> <p>2 Q And what did you determine?</p> <p>3 A That, unfortunately, the projections that</p> <p>4 were made around the time of the Webcasting II</p> <p>5 decision weren't fulfilled.</p> <p>6 Q Did you review anything with respect to the</p> <p>7 CPM rates?</p> <p>8 A Yes. During the Webcasting II proceeding,</p> <p>9 SoundExchange's economic expert, Dr. Brynjulfsson,</p> <p>10 estimated that audio CPMs, cost per thousands, the</p> <p>11 prices they charge for the audio advertising, were</p> <p>12 going to increase by a 4.5 percent compounded annual</p> <p>13 growth rate during the period of 2005 through 2010.</p> <p>14 In looking at the Accustream report, they estimate</p> <p>15 that during that period that the compounded actual</p> <p>16 growth rate of the audio CPMs were actually a negative</p> <p>17 11.7 percent.</p> <p>18 Q And, Dr. Fratrik -- I'm sorry to interrupt --</p> <p>19 is that reflected in figure 1 of your report on</p> <p>20 page 12?</p> <p>21 A Yes, it is. I also looked at the display ads</p> <p>22 CPMs, the cost per thousand, the prices that are</p>
1098	<p>1 charged. And while at that time the --</p> <p>2 Dr. Brynjulfsson estimated that it would -- that he</p> <p>3 expected a 5.5 percent compounded annual growth rate</p> <p>4 increase during this period, the Credit Suisse</p> <p>5 article -- study that I have as an exhibit actually</p> <p>6 estimates a negative 5.9 percent for the entire time</p> <p>7 period.</p> <p>8 Q And what you just testified to, is that</p> <p>9 reflected in figure 2 of your report on page 13?</p> <p>10 A Yes, it is.</p> <p>11 Q Did you review anything else that tended to</p> <p>12 confirm this decline in CPM rates?</p> <p>13 A Yeah. As part of my discussions with</p> <p>14 personnel at Live365, I talked to Mr. Floater about</p> <p>15 what his experience -- since he's in charge of selling</p> <p>16 advertising -- what his experience was during this</p> <p>17 time period, and he estimated that between 2006 and</p> <p>18 2009, he saw a 30 percent decrease in audio</p> <p>19 advertising CPM, which is in conformance with the</p> <p>20 numbers I was just talking about earlier.</p> <p>21 Q Do you know why there's been a decrease in</p> <p>22 CPM rates?</p>

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<p style="text-align: right;">1099</p> <p>1 A Yes. There's been an explosion of 2 advertising opportunities for retailers and other 3 businesses to get their messages out. Obviously, 4 there had been hundreds of thousands of millions of 5 new web sites that provide these opportunities, as 6 well as many other types of advertising vehicles that 7 local businesses and national businesses can use to 8 get their advertising message. So there's been a 9 tremendous increase in the wider advertising 10 marketplace, which I believe led to that lowering of 11 the CPM.</p> <p>12 Q Was there anything else you came away with 13 with respect to your review of the industry, the 14 recent history of the webcasting industry?</p> <p>15 A Yeah. As also part of Dr. Brynjulfsson's 16 testimony in the Webcasting II proceeding, he 17 estimated in his model that listening hours would 18 increase 25 percent annually during -- each year 19 during this five-year period.</p> <p>20 JUDGE ROBERTS: Dr. Fratrik, before we leave 21 CPMs, I'm looking at your chart on page 12 which 22 you've identified as figure 1 where you show a decline</p>	<p style="text-align: right;">1101</p> <p>1 measuring it across all audio industries?</p> <p>2 THE WITNESS: In this chart, I am utilizing 3 Accustream's CPMs for Internet radio, but I'm 4 suggesting that the advertising marketplace in -- 5 which Internet radio is a part of has just exploded, 6 and so many more opportunities that led to the 7 decrease in the CPMs.</p> <p>8 JUDGE ROBERTS: Okay. My question to you 9 was, has the supply in the Internet radio business 10 remained the same during this time period or do you 11 know whether that's the case or not?</p> <p>12 THE WITNESS: I believe that there has been 13 some entry of new Internet radio webcasting services 14 selling advertising. So there had been some increase 15 in the supply of opportunities for advertisers.</p> <p>16 JUDGE ROBERTS: Do you know if that could 17 have had any impact in the decrease in average CPMs?</p> <p>18 THE WITNESS: It certainly did have somewhat 19 of an impact in competitive pressure to lower the 20 prices.</p> <p>21 JUDGE ROBERTS: Thank you. 22 BY MR. MacDONALD:</p>
<p style="text-align: right;">1100</p> <p>1 in CPMs from 2005 to 2010. Do you know if, during 2 that time period, the supply of CPMs is relatively 3 constant?</p> <p>4 THE WITNESS: The supply of advertising time?</p> <p>5 JUDGE ROBERTS: Yes.</p> <p>6 THE WITNESS: I believe not because I believe 7 that there was an increase in the number of -- on the 8 wider advertising marketplace, a number of more 9 opportunities for advertisers to get their messages 10 out.</p> <p>11 JUDGE ROBERTS: So you think that the 12 advertising time has increased, and could that have 13 had an impact on the decrease in CPMs, the increase in 14 the supply of advertising time?</p> <p>15 THE WITNESS: Your Honor, that's exactly what 16 I think is the case. I think that this wider 17 advertising, ever-expanding advertising marketplace, 18 had led to competitive pressure on all advertising 19 vehicles, i.e., the prices that are charged for that 20 and measured in CPMs.</p> <p>21 JUDGE ROBERTS: So you are not measuring it 22 here just for the Internet radio business here; you're</p>	<p style="text-align: right;">1102</p> <p>1 Q Dr. Fratrik, with respect to the recent 2 history of commercial webcasting, did you review 3 anything with respect to listenership levels?</p> <p>4 A Yes, I did. At that time of Webcasting II 5 proceeding, there was a belief that total listening 6 hours were going to increase by large percentages 7 every year.</p> <p>8 Dr. Brynjulfsson estimated an annual increase 9 of 25 percent in aggregate tuning hours. Others at 10 that time -- the same time -- such as a research firm 11 called Bridge Ratings -- also predicted continued 12 increases in monthly listening levels. In fact, 13 Bridge Ratings estimated that by the end of 2009 that 14 there would be 116.1 million listeners.</p> <p>15 In the Infinite -- misnamed Infinite Dial 16 report, Arbitron estimated that the -- that the 17 monthly listening levels as of late of 2008 were only 18 69 million.</p> <p>19 So what I surmise from that is that while it 20 has increased over that time period, it certainly did 21 not realize the levels that were suggested in the 22 earlier proceedings.</p>

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1103	<p>1 Q Were there any other reports that tracked</p> <p>2 unique listeners to the Internet radio space?</p> <p>3 A Yeah. The JPMorgan study that's one of my</p> <p>4 exhibits also did a monthly look at listeners going to</p> <p>5 both broadcaster to simulcast as well as pure play</p> <p>6 sites. And from June of 2006 through February 2008,</p> <p>7 the last month which JPMorgan provided data, there was</p> <p>8 actually a 18.7 percent decrease in the number of</p> <p>9 listeners, monthly unique listeners, going to the pure</p> <p>10 play sites.</p> <p>11 Q And is that listenership data reflected in</p> <p>12 figure 3, page 15 of your report?</p> <p>13 A Yes, it is.</p> <p>14 Q One last question on this section,</p> <p>15 Dr. Fratrik. When you evaluate an industry, do you</p> <p>16 always look at the recent history?</p> <p>17 A Oh, very much so. When I'm valuing a radio</p> <p>18 station, I look at the -- on an ongoing valuation</p> <p>19 situation, I look at the recent history of that</p> <p>20 station. I look at the recent history of the local</p> <p>21 market revenue in forecasting what I expect that</p> <p>22 station or that market to do in the future.</p>	1105	<p>1 17, you refer to several assumptions you made in</p> <p>2 connection with your economic model. What are these</p> <p>3 assumptions?</p> <p>4 A Well, the first assumption that I am using is</p> <p>5 that I'm saying that Live365 is a representative</p> <p>6 webcaster with respect to operating costs. Live365</p> <p>7 had been in the webcasting business for ten-plus years</p> <p>8 and, in recent years, they've been making a strong</p> <p>9 effort to keep their costs down low. So I think this</p> <p>10 is a good proxy. This is a good model -- a good</p> <p>11 company to describe the costs.</p> <p>12 I also am utilizing industry reports from</p> <p>13 Accustream and ZenithOptimedia to provide me with</p> <p>14 industry revenues or advertising revenues for the</p> <p>15 webcasting industry. In my model I assume that</p> <p>16 webcasters -- a typical webcaster had two sources of</p> <p>17 revenues, subscription revenues and advertising</p> <p>18 revenues.</p> <p>19 And the final assumption I have is that I</p> <p>20 assume that a typical webcaster is entitled to a</p> <p>21 reasonable operating margin.</p> <p>22 Q Dr. Fratrik, I'd like to go through your</p>
1104	<p>1 Q Dr. Fratrik, I'd like to turn your attention</p> <p>2 to the next section which begins at page 15. The</p> <p>3 heading is, "Economic model of the appropriate royalty</p> <p>4 rate." Do you see where I'm referring to?</p> <p>5 A Yes.</p> <p>6 Q Before we get into more detail, can you tell</p> <p>7 me generally what royalty rate you're referring to</p> <p>8 here?</p> <p>9 A I'm referring to the digital sound recording</p> <p>10 performance royalty rate.</p> <p>11 Q And can you please describe at a high level</p> <p>12 your model?</p> <p>13 A What I'm trying to do here is to end up with</p> <p>14 the resulting value of the copyrighted material. So</p> <p>15 what I do is I try and estimate the revenues of a</p> <p>16 typical webcaster and subtract the cost of the</p> <p>17 webcaster outside of the royalty payment that they're</p> <p>18 subject to now, because that's the focus of what I'm</p> <p>19 trying to do, the end value, as well as include a</p> <p>20 reasonable profit margin as a percentage of revenue in</p> <p>21 my calculations.</p> <p>22 Q Starting on page 16 and going to the top of</p>	1106	<p>1 methodology with a little bit more specificity. Let's</p> <p>2 turn to page 23. Are you there, Dr. Fratrik?</p> <p>3 A Yes, I am.</p> <p>4 Q Now, near the top of the page, in bold,</p> <p>5 there's a heading titled, "Economic model for a</p> <p>6 typical commercial webcaster." Do you see this?</p> <p>7 A Yes.</p> <p>8 Q Can you summarize what you've done in</p> <p>9 section III which goes through page 21 [sic] of your</p> <p>10 corrected and amended written testimony?</p> <p>11 A What I do in my modeling is I use two</p> <p>12 industry reports for the total advertising revenue</p> <p>13 from the webcasting industry to generate -- help</p> <p>14 generate what a typical webcaster would generate in</p> <p>15 advertising revenues and combine that with information</p> <p>16 about subscription revenues -- I can determine what</p> <p>17 information -- what revenues a typical commercial</p> <p>18 webcaster generates in its normal course of business.</p> <p>19 Also, utilizing the Live365 cost structure, I</p> <p>20 then estimate what a typical webcaster would incur in</p> <p>21 terms of operating costs for providing that webcasting</p> <p>22 service. And finally, as I mentioned before, I also</p>

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1107	<p>1 have a 20 percent profit margin at a percentage of</p> <p>2 revenue that I think a webcaster would generate.</p> <p>3 And what ends up happening, after I take</p> <p>4 those revenues and minus those costs, I derive a value</p> <p>5 for the copyrighted work.</p> <p>6 Q What type of data did these two reports, the</p> <p>7 Accustream report and the ZenithOptimedia report,</p> <p>8 provide?</p> <p>9 A The Accustream report provides an industry</p> <p>10 estimate of advertising revenues from webcasting as</p> <p>11 well as an estimate of the total aggregate tuning</p> <p>12 hours for webcasters. ZenithOptimedia likewise</p> <p>13 provides an industry -- total industry revenues from</p> <p>14 U.S. Internet radio.</p> <p>15 Q Did you speak to anyone at either of these</p> <p>16 companies, Accustream or ZenithOptimedia, to</p> <p>17 understand their methodology for calculating their</p> <p>18 estimates?</p> <p>19 A Yes. I talked to one individual at both</p> <p>20 firms.</p> <p>21 Q And why did you talk to these individuals?</p> <p>22 A I wanted to get a sense of how they generated</p>	1109
1108	<p>1 these industry revenue estimates to sort of assess</p> <p>2 their reliability.</p> <p>3 Q And based on these conversations, do you</p> <p>4 think that these estimates are reliable?</p> <p>5 A Yes, I do.</p> <p>6 Q Did you do anything else to confirm the</p> <p>7 validity of these industry estimates for ad revenues?</p> <p>8 A Yes. During the discovery process, I got</p> <p>9 access to information from SoundExchange as to the</p> <p>10 percentage of listening hours attributable to Live365.</p> <p>11 Utilizing that percentage, as well as the advertising</p> <p>12 revenue generated by Live365, I came up with an</p> <p>13 industry estimate.</p> <p>14 Q And what was that estimate?</p> <p>15 A It was around 85, 84 to \$85 million.</p> <p>16 Q And was that within the range of estimates</p> <p>17 provided by Accustream and ZenithOptimedia?</p> <p>18 A Yes, they were.</p> <p>19 Q Let's move now to page 26, Dr. Fratrik, or at</p> <p>20 least the discussion beginning on page 26, and</p> <p>21 referring to the heading midway through the page,</p> <p>22 "Assessment of industry revenue (ZenithOptimedia</p>	1110

1 report)," what was ZenithOptimedia's estimated ad

2 revenues for 2008?

3 A They estimated that for U.S. Internet radio

4 it was \$200 million in advertising revenues.

5 Q And how does that compare with the Accustream

6 estimate?

7 A It's higher.

8 Q Now, I would like to turn your attention to

9 page 28 and specifically table 5. What is table 5,

10 Dr. Fratrik?

11 A Table 5 summarizes my model using the

12 ZenithOptimedia total Internet radio advertising

13 revenue estimate.

14 Q And in the first row, you provide a heading

15 "revenue per ATH." Generally, speaking, why were you

16 examining revenue on a per ATH basis?

17 A Per ATH I believe is the most basic form of

18 what Internet radio services provide. It's hours of

19 listening, hours of music or other type of

20 performances. So I wanted to do it on the basic unit.

21 It also allows me to combine the revenue from

22 advertising as well as from subscription sources.

1 Q How you did you derive the .0872 figure for

2 the revenue per ATH row?

3 A I first took the ZenithOptimedia total

4 industry revenue to \$200 million and divided that by

5 the 2.95 billion aggregate tuning hours, that estimate

6 from Accustream, and that results in .0678 per

7 revenue -- advertising revenue per ATH.

8 I then looked at the Live365 subscription --

9 monthly subscription revenues of \$6.02, as well as the

10 average number of hours a subscriber of Live365

11 utilizes Live365 services of 40 hours. And that

12 results in a subscriber revenue per ATH of .1505. I

13 utilized those two figures to derive a total average

14 revenue per ATH of .0872.

15 Q You mentioned using Live365's subscription

16 numbers. Why was that?

17 A At the time when I first made the model, that

18 was the only data that I had available.

19 Q Do you believe Live365's subscription prices

20 reflective of a typical commercial webcaster?

21 A Actually, they're on the high side because,

22 after reading Dr. Pelcovits' study in this proceeding,

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1111	<p>1 he averages -- he calculates an average of subscriber 2 revenue of \$4.13. 3 Q Let's look at the next line down, the row 4 that has the title "Total costs and expenses per ATH." 5 What calculation were you making here? 6 A That is the total cost of Live365 7 attributable to its Internet radio services divided by 8 the domestic royalty-bearing aggregate tuning hours of 9 around 74 million aggregate tuning hours. 10 Q And does this represent the cost for a 11 typical webcaster, Dr. Fratrik? 12 A I believe it does. 13 Q Let's go to the next row, "Operating profit 14 margins as percentage of revenues." What does that 15 row relate to? 16 A That's a range from 5 percent to 30 percent 17 of various operating profit margins. I put that in 18 there so as to provide some sort of sensitivity 19 analysis in my modeling. 20 Q And turning your attention to the next row, 21 "Reasonable profit per domestic ATH," what calculation 22 did you perform here, Dr. Fratrik?</p>	1113	<p>1 A Well, that's what I'm trying to get at, the 2 value of the copyrighted material. 3 Q And finally, Dr. Fratrik, the last row, 4 "Value per performance," what is this? 5 A This is simply the value of the copyrighted 6 material per ATH, per aggregate tuning hours, divided 7 by 14, which is the average number of performances per 8 hour that Live365 has, to arrive at a value of the 9 copyrighted material in my model on a per performance 10 basis. 11 Q And is this the model you were relying upon 12 for your rate proposal? 13 A Yes, it. 14 Q Based on this model, are you proposing a 15 particular royalty rate for non-interactive commercial 16 webcasters in this proceeding? 17 A Yes, I did. 18 Q What is that rate? 19 A It's .0009. 20 Q Why are you proposing this particular rate? 21 A I think this would be a likely outcome 22 between a negotiation between a willing buyer and a</p>
1112	<p>1 A That is simply that operating profit margin 2 in row 3 multiplied by the revenue per ATH which is 3 constant on row 1 of .0872. It's the actual dollar 4 amount of operating profit corresponding to the 5 various profit margins that I list there. 6 Q Going to the next row, total cost per 7 domestic -- sorry -- "Total cost per domestic ATH," 8 how did you calculate this? 9 A That is simply row 2 added to row 4, the 10 total cost and expenses per ATH added to the dollar 11 amount of the reasonable profit per domestic ATH for 12 the various different operating margins. 13 Q And the next row is, "Value of copyrighted 14 material per ATH." How did you calculate the figures 15 in that row? 16 A That is, once again, just simply a 17 mathematical calculation of the revenue per ATH, 18 line 1, minus the total cost per domestic ATH -- and I 19 just described how I calculated that, which is 20 line 5 -- to give me a value of the copyrighted 21 material on a per ATH basis. 22 Q And why did you do that calculation?</p>	1114	<p>1 willing seller. 2 Q In going back to the discussion of an 3 appropriate operating margin, what is an operating 4 margin, generally? 5 A Operating margin is just the profits 6 representative -- as a percentage of the revenues, the 7 operating profits. 8 Q And why do you believe that a 20 percent 9 operating margin is appropriate? 10 A I think that gives a fair enough return to 11 commercial webcasters in order for them to pay their 12 depreciation, amortization and interest costs, which 13 are not -- expenses that are not part of the operating 14 expenses. 15 Q Now, just turning briefly back to page 26 of 16 your report where you have table 4, comparing that to 17 page 28, table 5, what is the difference between these 18 two tables? 19 A The only difference between these two tables 20 is that, instead of using the ZenithOptimedia total 21 advertising industry revenue estimate, I use the 22 Accustream total industry advertising revenue</p>

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1115	<p>1 estimate.</p> <p>2 Q And those Accustream revenue estimates were</p> <p>3 greater or lower than the ZenithOptimedia?</p> <p>4 A They were lower than ZenithOptimedia's.</p> <p>5 Q I'd like to turn your attention to the next</p> <p>6 section which begins at page 31 of your report and</p> <p>7 goes forward. You examined various factors,</p> <p>8 Dr. Fratrik, including competition, programming,</p> <p>9 promotion, investments. Why did you consider these</p> <p>10 factors?</p> <p>11 A It's my understanding that the copyright</p> <p>12 royalty board must consider these factors when setting</p> <p>13 an appropriate rate.</p> <p>14 Q Have you drawn any conclusions about these</p> <p>15 factors with respect to your recommended royalty</p> <p>16 rates?</p> <p>17 A Yes. I think the assessment of these factors</p> <p>18 support that royalty rate.</p> <p>19 Q How do they support it?</p> <p>20 A Well, for example, in terms of the promotion</p> <p>21 aspect of it, I'm struck by several pieces of</p> <p>22 information I discovered during my analysis. Live365</p>	1117
1116	<p>1 had several contracts with independent artists as well</p> <p>2 as labels who waived the performance royalty rates in</p> <p>3 lieu of getting more air play.</p> <p>4 I'm aware that Live365 sells -- had about</p> <p>5 \$1.3 million in click-through buys of CD-ROMs and</p> <p>6 MP3 -- not CD-ROMs -- CDs and MP3 files from its</p> <p>7 webcasts. I'm also struck by the data that's included</p> <p>8 in the Arbitron study where it indicates that many</p> <p>9 webcasters' listeners look towards the Internet to</p> <p>10 learn about new artists while listening to their</p> <p>11 webcasts.</p> <p>12 So, in sum, I think it's a great promotional</p> <p>13 venue for new artists and existing artists to get</p> <p>14 their music out so that listeners learn about them.</p> <p>15 Q Dr. Fratrik, I'd like to turn your attention</p> <p>16 to section VI of your report -- I'm sorry, section IV</p> <p>17 of your report which begins on page 38. Are you</p> <p>18 there, Dr. Fratrik? Is that a yes?</p> <p>19 A Yes.</p> <p>20 Q Do you have another rate proposal besides the</p> <p>21 industry rate that you've been just testifying about?</p> <p>22 A Yes.</p>	1118
	<p>1 Q And what is that rate proposal?</p> <p>2 A That's a rate proposal for an aggregation</p> <p>3 service.</p> <p>4 Q What is an aggregation service?</p> <p>5 A An aggregation service is a service that</p> <p>6 provides multiple webcasters on their site.</p> <p>7 Q And why are you proposing a separate</p> <p>8 aggregation rate proposal?</p> <p>9 A Two main reasons. This aggregation service</p> <p>10 provides tremendous administrative benefits by</p> <p>11 recordkeeping as well as compliance with certain</p> <p>12 regulations related to webcasting that -- of some</p> <p>13 benefit to a collective such as SoundExchange.</p> <p>14 Additionally, the aggregated service, because</p> <p>15 it has so many webcasters collectively, it can go into</p> <p>16 the advertising marketplace and sell advertising spots</p> <p>17 on the many webcasts that the individual webcaster</p> <p>18 couldn't do themselves. So in a sense it's helping</p> <p>19 sustain the financial footing of these individual</p> <p>20 webcasters.</p> <p>21 Q And how did you calculate the rate for your</p> <p>22 aggregation rate proposal?</p>	

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1119	<p>1 A Well, I averaged the two major PROs, BMI and</p> <p>2 ASCAP, and that arrives at a value of around</p> <p>3 19.5 percent. And given that SESAC is so much higher,</p> <p>4 I just raised that up to the next integer at</p> <p>5 20 percent.</p> <p>6 Q Dr. Fratrik, I'd like to turn your attention</p> <p>7 to section V of your corrected amended statement,</p> <p>8 which begins on page 40. This is where you discuss</p> <p>9 the use of the NAB settlement as a benchmark. And I'd</p> <p>10 like to ask a couple of questions about the NAB and</p> <p>11 its settlement with SoundExchange under the Webcaster</p> <p>12 Settlement Act. But first, how long were you employed</p> <p>13 at the NAB?</p> <p>14 A I was employed there nearly 16 years.</p> <p>15 Q And can you remind the court what your</p> <p>16 position was at the NAB?</p> <p>17 A I started off as the director of financial</p> <p>18 and economic research and, several years later, I</p> <p>19 became vice president of research and planning at the</p> <p>20 NAB.</p> <p>21 Q And in your work with the NAB, did you</p> <p>22 develop an understanding of the operating structure of</p>
1120	<p>1 a terrestrial broadcaster?</p> <p>2 A Very much so.</p> <p>3 Q Did you also examine the cost structure -- do</p> <p>4 you currently examine the cost structures of</p> <p>5 terrestrial broadcasters in your employment at BIA?</p> <p>6 A Yes, I do.</p> <p>7 Q Do you also examine the cost structure of a</p> <p>8 terrestrial broadcaster who simulcasts in connection</p> <p>9 with your employment at BIA?</p> <p>10 A Yes, I do.</p> <p>11 Q Do you believe the operating structure for a</p> <p>12 simulcaster is the same as a commercial webcaster?</p> <p>13 A No, I do not.</p> <p>14 Q Why not?</p> <p>15 A Well, commercial broad -- terrestrial</p> <p>16 broadcasters who are simulcasting have some inherent</p> <p>17 benefits when they're just simulcasting. They already</p> <p>18 have the programming that they are airing over the air</p> <p>19 and then are simulcasting it via their webcasts. They</p> <p>20 already have the managerial staff, the overhead for</p> <p>21 their over-the-air operations that they don't have to</p> <p>22 reconstruct for their simulcasts.</p>
1121	<p>1 And just as importantly, they have the</p> <p>2 advertising sales staff out there locally who can sell</p> <p>3 advertising both on a -- for their over-the-air</p> <p>4 broadcasts as well as their online broadcasts, their</p> <p>5 simulcasts.</p> <p>6 Q And based on your 16 years at the NAB and ten</p> <p>7 years at BIA, is it your opinion that a simulcaster</p> <p>8 would be willing to pay higher royalty rates than a</p> <p>9 webcaster who is not a simulcaster?</p> <p>10 A Yes.</p> <p>11 Q And why is that?</p> <p>12 A Well, in part, because of what I just</p> <p>13 mentioned, the tremendous cost savings that a</p> <p>14 simulcaster has as compared to a webcaster who has to</p> <p>15 start anew.</p> <p>16 In addition, local radio broadcasters have,</p> <p>17 as I mentioned, a sales staff out there, and they can</p> <p>18 provide a more targeted geographic audience to</p> <p>19 potential advertisers, which many local advertisers</p> <p>20 want, as opposed to a national audience which a</p> <p>21 commercial webcaster is offering.</p> <p>22 Q And is it your opinion that the NAB deal</p>
1122	<p>1 should be an appropriate benchmark for an</p> <p>2 industry-wide rate for a commercial webcaster?</p> <p>3 A No.</p> <p>4 Q Thank you very much, Dr. Fratrik.</p> <p>5 Oh, sorry. One more section. Now, at the</p> <p>6 end of your report, Dr. Fratrik, there are certain</p> <p>7 appendices. Did you do anything to update your 2008</p> <p>8 numbers in your model?</p> <p>9 A Yes, I did several things. We -- after the</p> <p>10 initial report was written, the fiscal year of Live365</p> <p>11 2009 ended, so I updated the analysis using Live365</p> <p>12 fiscal year 2009. I also utilized some data from --</p> <p>13 that was obtained during discovery that was from</p> <p>14 SoundExchange in terms of the subscriber revenues,</p> <p>15 average subscription revenues that Dr. Pelcovits had,</p> <p>16 as well as information about the distribution between</p> <p>17 subscriber hours versus non-subscribers hours for a</p> <p>18 webcaster.</p> <p>19 Q And after updating your numbers, did the</p> <p>20 updated data have an impact on the value of the</p> <p>21 copyrighted material in your analysis?</p> <p>22 A Yes, it did.</p>

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1123	<p>1 Q Are you proposing -- and what was that 2 amount? 3 A It actually lowered the value of the 4 copyright material. 5 Q Are you proposing a lower rate today? 6 A No, I'm not. 7 Q Why not? 8 A Because I think 2009 was a very tough year in 9 many advertising-based media, and I didn't want to use 10 that year as a basis for moving forward. 11 MR. MacDONALD: Thank you very much, 12 Dr. Fratrik. 13 I have no further questions at this time, 14 Your Honor. 15 CHIEF JUDGE SLEDGE: Any cross-examination by 16 SoundExchange? 17 MR. HANDZO: Yes, Your Honor. 18 CROSS-EXAMINATION 19 BY MR. HANDZO: 20 Q Good morning, Dr. Fratrik. 21 A Good morning, Mr. Handzo. 22 Q Now, Dr. Fratrik, you selected -- actually,</p>	1125	<p>1 A Yes. 2 Q Now, no other input for Live's business or 3 any webcaster's business is priced that way, is it? 4 A I don't know what you mean by that question. 5 Q Well, if Live365 isn't realizing a 20 percent 6 operating margin, Live doesn't get to go back to its 7 secretaries and say, you know, you all have to take a 8 pay cut because we need to reach a 20 percent margin, 9 right? 10 A They don't do that, no. 11 Q Okay. And if Live isn't operating at a 12 20 percent margin, Live doesn't get back to its 13 bandwidth suppliers and say, you know, we're just not 14 paying you the market rate because we need to earn a 15 20 percent margin, right? 16 A No, that's right. 17 Q Ad commissions. Live would like to pay lower 18 ad commissions, right? 19 A I believe they would. 20 Q But Live doesn't have the ability to go to 21 the ad agencies and just say, sorry, guys, we're not 22 making a 20 percent operating margin; you need to take</p>
1124	<p>1 let me state that differently. You rejected a 2 benchmark approach to your analysis in this case, 3 correct? 4 A Yes, I did. 5 Q Now, you were aware of the approach used by 6 Dr. Pelcovits, correct? 7 A In Webcasting II? 8 Q Yes. 9 A Yes. 10 Q But you rejected that because you thought 11 your approach was a more direct value of the 12 copyrighted material; is that right? 13 A A more straightforward approach in 14 determining that value. 15 Q Okay. So you think this approach is better 16 than a benchmark approach, correct? 17 A I believe it's more -- yes. 18 Q Now, your theory for your modeling is that 19 the price of the sound recording will be set at 20 whatever is left over after all other inputs for 21 Live365 are paid and a 20 percent return is paid to 22 Live, correct?</p>	1126	<p>1 a lower commission, right? 2 A That's correct. 3 Q So your theory is that the sound recording 4 royalty alone, of all of the inputs that make up a 5 successful webcaster, should be priced by just giving 6 the sound recording right whatever is left over after 7 everybody else gets paid, including the webcaster, 8 right? 9 A What I'm trying to determine is what, in this 10 hypothetical willing buyer/willing seller, the 11 webcaster would come in and say, this is what I think 12 I can pay, or the maximum I'm willing to pay. 13 Q And the question, Dr. Fratrik, is, that's not 14 the way it would work if Live is negotiating with its 15 secretaries or its advertising agencies, right? 16 A Right. Because Live's negotiations with 17 those entities are not governed by a copyright royalty 18 board who are setting the rates. 19 Q But what we're trying to do here is set the 20 rates that would exist in a hypothetical market 21 between a willing buyer and a willing seller that's 22 not subject to regulation, right?</p>

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<p>1127</p> <p>1 A That's exactly right.</p> <p>2 Q Okay. So what we should be looking at is how</p> <p>3 things work in real markets, right?</p> <p>4 A I agree with that insofar as if it's --</p> <p>5 that's what I'm trying to do insofar as, in the real</p> <p>6 market, this is what a commercial webcaster would want</p> <p>7 to -- at the maximum want to pay.</p> <p>8 Q Right. But you agree with me, don't you,</p> <p>9 that in a real market Live365 doesn't get to negotiate</p> <p>10 with its secretaries, its ad agencies or its bandwidth</p> <p>11 suppliers by just saying, we need a 20 percent return,</p> <p>12 so you need to take less?</p> <p>13 A I'm sure negotiations between those entities</p> <p>14 involve other factors.</p> <p>15 Q Now, under your theory, Dr. Fratrik, if the</p> <p>16 PROs -- ASCAP, BMI and SESAC -- suddenly raised their</p> <p>17 royalties, the imputed royalty for SoundExchange would</p> <p>18 go down, right?</p> <p>19 A If, during the negotiations, it would lead to</p> <p>20 that, the value of the copyrighted material would go</p> <p>21 down.</p> <p>22 Q Okay. So basically the way you modeled this</p>	<p>1129</p> <p>1 all the time about their rates.</p> <p>2 JUDGE WISNIEWSKI: I'm having a hard time</p> <p>3 understanding something here. If that's the case that</p> <p>4 they're negotiating simultaneously, how can you have</p> <p>5 any numbers in your model?</p> <p>6 THE WITNESS: What I'm trying to do, Judge,</p> <p>7 is I'm trying to sort of determine that value while</p> <p>8 everything else is remaining constant, that they have</p> <p>9 negotiated during that same time the prices for the</p> <p>10 secretaries, the prices for the PROs, et cetera.</p> <p>11 JUDGE WISNIEWSKI: Your model assumes a</p> <p>12 number, right --</p> <p>13 THE WITNESS: It assumes --</p> <p>14 JUDGE WISNIEWSKI: -- for all those other --</p> <p>15 THE WITNESS: Right, that those negotiations</p> <p>16 were occurring and they ended up with that amount.</p> <p>17 JUDGE WISNIEWSKI: Right. Thank you.</p> <p>18 BY MR. HANDZO:</p> <p>19 Q Now, given the theory behind your model, if</p> <p>20 it were the case that webcaster on the whole were</p> <p>21 losing money, your recommendation to this court would</p> <p>22 be that the sound recording would be priced at zero,</p>
<p>1128</p> <p>1 out, if anybody else who supplies an input to Live</p> <p>2 raises their price, the result is going to be your</p> <p>3 suggested royalty rate goes down, right?</p> <p>4 A Assuming all the other factors remain</p> <p>5 constant.</p> <p>6 Q And you think that's the way it would work in</p> <p>7 a real market?</p> <p>8 A In a real market, the hypothetical market,</p> <p>9 Live365 commercial webcasters entirely, as a group or</p> <p>10 individually, are negotiating -- at the same time when</p> <p>11 they're negotiating with the PROs, they're negotiating</p> <p>12 with the copyright owners also. It's a thing -- it</p> <p>13 doesn't happen when everything else happens in this</p> <p>14 hypothetical market. It doesn't necessarily happen</p> <p>15 that everybody else gets negotiated and then the</p> <p>16 copyright owners get negotiated. They would all be</p> <p>17 happening simultaneously. That's why I'm having</p> <p>18 trouble with your hypothetical.</p> <p>19 Q Well, in the real world, Live doesn't sit</p> <p>20 down and negotiate with everybody who supplies an</p> <p>21 input for Live services all at the same time, right?</p> <p>22 A In the normal course of businesses, they talk</p>	<p>1130</p> <p>1 right?</p> <p>2 A It depends upon what time period you're</p> <p>3 talking about. I mean, if they're losing money for</p> <p>4 one particular year, I would not suggest a price of</p> <p>5 zero. If they lost money and they were expected to</p> <p>6 gain revenues in the future, then there would be some</p> <p>7 value in that.</p> <p>8 Q But if it were the result of your analysis</p> <p>9 that webcasters overall were losing money, the result</p> <p>10 of your theory is that the sound recording royalty is</p> <p>11 zero, right?</p> <p>12 A Well, as I just said, if, in a particular</p> <p>13 year, they're losing money, it may be that, over a</p> <p>14 longer time period that their revenues would go up or</p> <p>15 that they could cut down on costs and that there would</p> <p>16 be some value in those performances.</p> <p>17 Q You don't expect -- it's your opinion that</p> <p>18 the marketplace for webcasting is not likely to change</p> <p>19 much over the next rate term, right?</p> <p>20 A My model includes a very high estimate for</p> <p>21 industry advertising revenues. We took the upper</p> <p>22 limit of that industry estimate for advertising</p>

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1131	<p>1 revenues. So I think there's some leeway there for</p> <p>2 some increase in performance in terms of generating</p> <p>3 revenues.</p> <p>4 Q Okay. But you're not assuming that that</p> <p>5 change in performance with respect to revenues is</p> <p>6 going to alter what you would suggest as the rate</p> <p>7 proposal, right?</p> <p>8 A If the revenues per ATH right now are lower</p> <p>9 than what I have of .0872, using the ZenithOptimedia,</p> <p>10 then -- and sometimes I'm assuming that they would</p> <p>11 increase.</p> <p>12 Q Dr. Fratrik, when you did your modeling, you</p> <p>13 looked at only webcaster costs and revenues, correct?</p> <p>14 A Yes.</p> <p>15 Q So you only looked at the seller's side of</p> <p>16 the equation -- I'm sorry. You only looked at the</p> <p>17 buyer's side of the equation, not the seller's side,</p> <p>18 right?</p> <p>19 A I looked -- in my report, I made some</p> <p>20 reference to the fact that, for providing their</p> <p>21 product, the copyrighted material, I did not believe</p> <p>22 there were much additional costs in providing that</p>
1132	<p>1 product. So I did look a little on the seller's side.</p> <p>2 Q Okay. But in your model itself, you don't</p> <p>3 try and figure out what the costs and revenues of</p> <p>4 record companies are, right?</p> <p>5 A The costs and revenue of -- the total costs</p> <p>6 and revenue of the record companies?</p> <p>7 Q Well, let's start with that. You don't</p> <p>8 determine that, do you?</p> <p>9 A No, I do not.</p> <p>10 Q You don't determine the costs and revenues of</p> <p>11 any individual record company, right?</p> <p>12 A Not of their entire business, no.</p> <p>13 Q Okay. So the costs and revenues of the</p> <p>14 record companies, who are the sellers here, does not</p> <p>15 play any role in your determination of what the</p> <p>16 appropriate rate is here, correct?</p> <p>17 A No, I disagree with that.</p> <p>18 Q Well, it certainly -- that data does not show</p> <p>19 up in your model, does it?</p> <p>20 A I don't have any data on the actual</p> <p>21 additional marginal costs that the record companies</p> <p>22 incur from providing their services to webcasting</p>
1133	<p>1 services. But I don't believe that that is a very</p> <p>2 significant amount.</p> <p>3 Q You've not talked to anyone at a record</p> <p>4 company, correct?</p> <p>5 A No, I have not.</p> <p>6 Q You've not seen financial records of record</p> <p>7 companies, correct?</p> <p>8 A I'm trying to remember if, during discovery,</p> <p>9 there were any financial records. I don't recall them</p> <p>10 right now.</p> <p>11 Q Okay. You don't know what the costs and</p> <p>12 investments of record companies are, do you?</p> <p>13 A Of the total industry, no.</p> <p>14 Q Or of any individual record company, right?</p> <p>15 A No, but I believe that -- my understanding of</p> <p>16 the process is that the cost of providing the</p> <p>17 additional services -- their products, their</p> <p>18 copyrighted material -- to webcasting services is very</p> <p>19 minimal.</p> <p>20 Q Okay. And so, in your view, we should just</p> <p>21 allocate all of the costs and investments of a record</p> <p>22 company to other businesses and not allocate any of it</p>
1134	<p>1 to webcasting; is that right?</p> <p>2 A What I'm looking at -- when a willing seller</p> <p>3 is thinking about whether or not to sell to the</p> <p>4 webcasting services, the fact of that -- they look at</p> <p>5 the marginal costs, the additional costs of providing</p> <p>6 this already-established product to this additional</p> <p>7 venue of getting their copyrighted materials out</p> <p>8 there.</p> <p>9 Q So does that mean that you're assuming that,</p> <p>10 because the marginal cost is very low, the record</p> <p>11 companies would always sell at a very low price?</p> <p>12 A They will try and get the highest price that</p> <p>13 they can, but they would -- it would be determined</p> <p>14 between a negotiation between the willing buyer of the</p> <p>15 commercial webcasters as well as the record companies.</p> <p>16 Q Well, in fact, looking at the marketplace,</p> <p>17 wouldn't you agree that the record companies' marginal</p> <p>18 cost of selling to an on-demand service is also very</p> <p>19 low, right?</p> <p>20 A I think the difference between an on-demand</p> <p>21 service and a commercial webcaster, the</p> <p>22 non-interactive services are somewhat different.</p>

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1135	<p>1 Q I don't think that was my question. You</p> <p>2 don't know that there's any difference in the marginal</p> <p>3 cost for a record company selling to an on-demand</p> <p>4 service versus selling to a webcaster, right?</p> <p>5 A The marginal cost of selling to an on-demand</p> <p>6 service, I think, would also involve possibly some</p> <p>7 computation of a substitutability of an on-demand</p> <p>8 service versus selling a CD or an MP3 file.</p> <p>9 Q And you would agree that if there is some</p> <p>10 substitution effect by selling either to an on-demand</p> <p>11 service or to a webcasting service, that would be a</p> <p>12 real cost to the record company, correct?</p> <p>13 A It's what economists refer to as an</p> <p>14 opportunity cost, yes.</p> <p>15 Q Okay. And you would agree with me, wouldn't</p> <p>16 you, that there actually is some likely substitution</p> <p>17 effect when record companies sell to webcasters?</p> <p>18 A Which kind of webcasters are you talking</p> <p>19 about?</p> <p>20 Q Webcasters like Live365.</p> <p>21 A I think there may be a substitution effect,</p> <p>22 but given the performance rules, I don't think there</p>	1137	<p>1 Q Now let me turn to the results of your model</p> <p>2 and let's start with table 2 on page 21. Do you see</p> <p>3 that?</p> <p>4 A Yes.</p> <p>5 Q Now, this is the results of your model using</p> <p>6 Live365 data, correct?</p> <p>7 A That is correct. Fiscal year 2008.</p> <p>8 Q Right. Now, as I understood your testimony</p> <p>9 earlier, you believe that a willing buyer in this</p> <p>10 marketplace would insist on a 20 percent operating</p> <p>11 margin, correct?</p> <p>12 A In their negotiations, they would strive to</p> <p>13 get that, yes.</p> <p>14 Q Well, let's explore that for a second. Are</p> <p>15 you saying they would just try and get it or are you</p> <p>16 saying that they would not buy unless they could get a</p> <p>17 rate that would give them a 20 percent operating</p> <p>18 margin?</p> <p>19 A They would strive to get the best rate that</p> <p>20 they can, and I believe that the rate that they would</p> <p>21 arrive at, that they really want, is one corresponding</p> <p>22 to the 20 percent operating margin.</p>
1136	<p>1 is a very significant one.</p> <p>2 Q Okay. But you haven't done anything to try</p> <p>3 and figure out what the magnitude of a substitution</p> <p>4 effect would be when a record company sells to a</p> <p>5 webcaster, correct?</p> <p>6 A No, I have not.</p> <p>7 Q Okay. And so you can't quantify what that</p> <p>8 would cost the record company, right?</p> <p>9 A No, I have not.</p> <p>10 Q And you don't take that into account in your</p> <p>11 model, do you?</p> <p>12 A No, because I don't believe that the -- just</p> <p>13 that the substitutability is that close, given the</p> <p>14 complement rules.</p> <p>15 Q Now, when you did cost allocations for</p> <p>16 Live365 in your modeling here, you allocated costs</p> <p>17 based on the amount of revenue associated with that</p> <p>18 cost, right?</p> <p>19 A That was part of it, yes.</p> <p>20 Q Okay. But you didn't adopt that approach in</p> <p>21 looking at the record companies, right?</p> <p>22 A No, I didn't.</p>	1138	<p>1 Q I want to be clear. Is it your testimony,</p> <p>2 Dr. Fratrik, that a willing buyer in the statutory</p> <p>3 webcasting market would not buy except at a rate that</p> <p>4 produces a 20 percent operating margin?</p> <p>5 A In the hypothetical willing buyer/willing</p> <p>6 seller paradigm that we're looking at, I believe</p> <p>7 that's what they would be trying to get at and,</p> <p>8 through negotiations, would achieve.</p> <p>9 Q I'm sorry. I'm asking a slightly different</p> <p>10 question, Dr. Fratrik. Just to be clear, when I</p> <p>11 negotiate with Jenner & Block over my compensation, I</p> <p>12 try and get the highest that I can, too, but I can</p> <p>13 assure you I don't usually get it and I settle for</p> <p>14 less.</p> <p>15 So my question is not what would you strive</p> <p>16 for but, rather, what is the number that, in your</p> <p>17 view, a willing buyer in this market would have to get</p> <p>18 in terms of operating margin or else it wouldn't be a</p> <p>19 willing buyer?</p> <p>20 A I believe the 20 percent rate is what they</p> <p>21 would strive to get and have to get.</p> <p>22 Q Okay. Now, looking at your table 2, you have</p>

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1139	1141
<p>1 a highlighted column there. Do you see that?</p> <p>2 A Yes, I do.</p> <p>3 Q And that's the imputed -- that shows us the</p> <p>4 imputed royalty rate if Live, as you've calculated it,</p> <p>5 were to get a 20 percent operating margin for its</p> <p>6 webcasting business, correct?</p> <p>7 A That's correct.</p> <p>8 Q And what that shows us is that in order for</p> <p>9 Live to get a 20 percent operating margin from its</p> <p>10 webcasting business, as you've calculated it, the</p> <p>11 record companies would have to pay Live to broadcast</p> <p>12 their music?</p> <p>13 A I wouldn't characterize it that way. I would</p> <p>14 characterize it that Live365 is not obtaining the</p> <p>15 20 percent operating margin.</p> <p>16 Q But you're using this model in order to</p> <p>17 recommend a rate to this court, right?</p> <p>18 A I am using this model with varying different</p> <p>19 industry revenue estimates.</p> <p>20 Q And if we used this model and your data for</p> <p>21 Live365 shown in table 2 to recommend a rate to the</p> <p>22 court, the result would be that you'd be recommending</p>	<p>1 live with a 5 percent operating margin on its</p> <p>2 webcasting business, the royalty rate would be .0004</p> <p>3 dollars per play, correct?</p> <p>4 A Using fiscal year 2008 Live revenue numbers.</p> <p>5 Q That's correct, though, right?</p> <p>6 A Yes.</p> <p>7 Q Okay. Have you done a calculation,</p> <p>8 Dr. Fratrik, to see what the imputed royalty would be</p> <p>9 under your model in table 2 if Live were getting a</p> <p>10 zero operating margin?</p> <p>11 A No, I did not.</p> <p>12 Q Does it sound right that if you did that</p> <p>13 math, it would turn out that the imputed royalty rate</p> <p>14 would be about .0007 dollars per performance?</p> <p>15 A That's approximately what I think it would</p> <p>16 be.</p> <p>17 Q Now, you're proposing actually a rate</p> <p>18 somewhat higher than that, at .0009, right?</p> <p>19 A Yes, I am.</p> <p>20 Q Okay. So if your analysis of Live365's costs</p> <p>21 and revenues attributed to its webcasting service is</p> <p>22 correct, then Live will lose money at any royalty</p>
1140	1142
<p>1 a negative royalty, right?</p> <p>2 A If I was using Live365 table 2 for my</p> <p>3 recommended royalty rate, yes, that would be it. But</p> <p>4 I'm not using table 2 and Live365 revenue as my model</p> <p>5 to recommend my royalty rate.</p> <p>6 Q Okay. Now, let's just look at this a little</p> <p>7 bit further. You have another column that would show</p> <p>8 what the imputed royalty would be for Live365 if Live</p> <p>9 were willing to accept a 15 percent margin, correct?</p> <p>10 A That's correct.</p> <p>11 Q And for that column, what you show is the</p> <p>12 imputed royalty would be zero, correct?</p> <p>13 A That's correct.</p> <p>14 Q So -- and looking one column further over to</p> <p>15 the left, you've got a column that shows what the</p> <p>16 imputed royalty would be at a 5 percent margin, right?</p> <p>17 A That's two columns over to the left.</p> <p>18 Q I'm sorry, two columns over. That would be</p> <p>19 the first column with the numbers in it?</p> <p>20 A Yes.</p> <p>21 Q And for that column, based on your modeling</p> <p>22 and based on Live365's data, if Live were willing to</p>	<p>1 rate, including the one that you're recommending.</p> <p>2 right?</p> <p>3 A No.</p> <p>4 Q Well, you've just agreed with me, as I</p> <p>5 understand it, that even at a zero operating margin,</p> <p>6 the imputed royalty rate would be .0007, right?</p> <p>7 A Yes.</p> <p>8 Q You're recommending .0009, which is higher,</p> <p>9 right?</p> <p>10 A Yes.</p> <p>11 Q So if these numbers are right in table 2, at</p> <p>12 your royalty rate, Live would be losing money?</p> <p>13 A No, because I think Live365 would take other</p> <p>14 actions if the royalty rate was at .0009 instead of</p> <p>15 the present rate of .0019.</p> <p>16 Q And is it your testimony, then, that those</p> <p>17 actions would alter Live's profitability?</p> <p>18 A I believe they would make efforts to try and</p> <p>19 increase their revenues, make some investment and do</p> <p>20 other actions that may result in increased revenues as</p> <p>21 well as -- and thus increase profitability from what</p> <p>22 they presently have.</p>

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1143	<p>1 Q Okay. So it is your testimony, then, that</p> <p>2 Live is not currently trying to maximize profits from</p> <p>3 its webcasting service?</p> <p>4 A No, that's not my testimony.</p> <p>5 Q Well, I thought you just told us that there</p> <p>6 are things Live can do to increase its profitability,</p> <p>7 right?</p> <p>8 A I said that under your hypothetical that the</p> <p>9 CRB accepts my .0009 royalty rate as opposed to what</p> <p>10 the present royalty rate is.</p> <p>11 Q And just so I understand, what is it you</p> <p>12 think Live could do to increase its profitability</p> <p>13 right now?</p> <p>14 A Well, as a result of the increase in royalty</p> <p>15 rates of the Webcasting II decision, Live365 put in</p> <p>16 some controls to actually lower the number of</p> <p>17 aggregate tuning hours. It could possibly adjust</p> <p>18 those controls. It could possibly lead to a greater</p> <p>19 marketing effort. It could possibly lead to greater</p> <p>20 sales efforts. It could take a host of different</p> <p>21 types of other actions.</p> <p>22 Q Now, any of these things that you just</p>	1145	<p>1 A Yes, it would.</p> <p>2 Q But at higher cost, right?</p> <p>3 A Yes.</p> <p>4 Q And you don't have any reason to think that</p> <p>5 Live is going to be more profitable on a per ATH basis</p> <p>6 even if it brings in some more revenue, right?</p> <p>7 A It may or may not be more profitable.</p> <p>8 Q You don't know, right?</p> <p>9 A Is it a hypothetical? No, I don't know.</p> <p>10 Q And since you don't know whether Live can be</p> <p>11 more profitable on an ATH basis, even if it takes</p> <p>12 steps in the future, you can't say that Live is ever</p> <p>13 going to be profitable for its webcasting business,</p> <p>14 even at the rates you propose, right?</p> <p>15 A I can't say for certain, but I think it may</p> <p>16 have greater opportunities to do that.</p> <p>17 Q Okay. Now, assuming, for the sake of</p> <p>18 argument, that you were right and there were things</p> <p>19 that Live could do right now to improve its</p> <p>20 profitability per ATH, there's no reason in the world</p> <p>21 why they wouldn't actually do them now, is there?</p> <p>22 A Yes, there is a reason, because they don't</p>
1144	<p>1 mentioned -- taking off the controls on ATH,</p> <p>2 marketing, sales -- if that increased revenue, it's</p> <p>3 also going to increase costs, right?</p> <p>4 A Yes, it would.</p> <p>5 Q Not only the cost for those efforts, but the</p> <p>6 cost of the bandwidth associated with the additional</p> <p>7 ATH and so on, right?</p> <p>8 A Yes, it would.</p> <p>9 Q Okay. And you have no reason to think that</p> <p>10 if Live takes efforts to bring in more ATH, for</p> <p>11 example, that it's going to do so on the basis which</p> <p>12 allows it to be more profitable for each of those</p> <p>13 hours, right?</p> <p>14 A Can you rephrase that question?</p> <p>15 Q Sure. In order for the numbers in your model</p> <p>16 to change, it's not just a matter of Live getting more</p> <p>17 revenue; Live would have to get more revenue at lower</p> <p>18 costs, right?</p> <p>19 A On a per ATH basis, yes.</p> <p>20 Q Everything you just told me that you think</p> <p>21 Live could do would be aimed at bringing in more</p> <p>22 revenue, right?</p>	1146	<p>1 believe maybe at the prevailing performance rate,</p> <p>2 royalty rate, that it isn't as profitable as it would</p> <p>3 be under my suggested rate.</p> <p>4 Q But as a rational businessman, wouldn't I</p> <p>5 always want to maximize my profits?</p> <p>6 A That's one of the tenets of microeconomics,</p> <p>7 yes.</p> <p>8 Q Okay. And so if there were things I could do</p> <p>9 right now to increase my profits, wouldn't I do them?</p> <p>10 A Yes, as long as you incorporate in your</p> <p>11 analysis all of the costs involved in those actions.</p> <p>12 Q Okay. But I thought you just told us that</p> <p>13 the steps Live could take would improve its</p> <p>14 profitability per ATH; that is, the additional revenue</p> <p>15 would be greater than the additional cost?</p> <p>16 A But I was talking in a hypothetical of my</p> <p>17 rate of .0009 as opposed to the prevailing performance</p> <p>18 rate.</p> <p>19 Q I guess what I'm not understanding,</p> <p>20 Dr. Fratrik -- and maybe you can explain it to me --</p> <p>21 is why, at any rate, if Live has the ability to</p> <p>22 improve its profitability per ATH, why it wouldn't</p>

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<p>1147</p> <p>1 just do that?</p> <p>2 A What I was suggesting, sir -- what I was</p> <p>3 suggesting that, at the lower rate of .0009, that</p> <p>4 Live365 may take actions that would increase their</p> <p>5 listenership, increase their advertising revenues,</p> <p>6 that with that .0009 rate, that it would be</p> <p>7 profitable.</p> <p>8 Now, it may not be true that, at the</p> <p>9 prevailing rate, which is more than double of that,</p> <p>10 that that -- those actions would be profitable.</p> <p>11 CHIEF JUDGE SLEDGE: Dr. Fratrik, let me ask,</p> <p>12 in light of those comments, and if you assume that the</p> <p>13 seller has no options available because the seller is</p> <p>14 required to sell, wouldn't that indicate that it's</p> <p>15 appropriate to consider the seller's financial data</p> <p>16 rather than the buyer in setting the value of the</p> <p>17 content?</p> <p>18 THE WITNESS: Judge Sledge, it's my</p> <p>19 understanding that the hypothetical willing buyer</p> <p>20 [sic] negotiation is an interaction with the two of</p> <p>21 them, the willing buyer and the willing seller. And,</p> <p>22 as I said, my model explains what -- the maximum that</p>	<p>1149</p> <p>1 MR. HANDZO: May I approach, Your Honor?</p> <p>2 BY MR. HANDZO:</p> <p>3 Q Dr. Fratrik, I am showing you what we marked</p> <p>4 previously as SoundExchange Exhibit 25 which I believe</p> <p>5 is not yet in evidence. Have you seen this document</p> <p>6 before?</p> <p>7 A I believe I've seen it, yes.</p> <p>8 Q Okay. And this document indicates that</p> <p>9 currently --</p> <p>10 A Wait a second. I may not have seen it, given</p> <p>11 the date of -- as of January 31st. I might have seen</p> <p>12 the balance sheet previously.</p> <p>13 Q Okay. You've seen a document much like this?</p> <p>14 A Yes.</p> <p>15 Q And this would indicate that, currently,</p> <p>16 Live365 has \$6.1 million available cash in the bank?</p> <p>17 A As of January 31st, it appears they did have</p> <p>18 that.</p> <p>19 Q So it is correct, is it not, that if there</p> <p>20 were investments for Live to make that would improve</p> <p>21 its profitability per ATH, it has the financial</p> <p>22 wherewithal to make those investments, right?</p>
<p>1148</p> <p>1 the willing buyer would be willing to pay, the value</p> <p>2 of the copyrighted material on a per performance</p> <p>3 basis. And it's also my understanding that the cost,</p> <p>4 the marginal cost of providing those services is very</p> <p>5 small.</p> <p>6 So I believe that the end result of that</p> <p>7 negotiation would be close to the royalty rate that I</p> <p>8 have suggested.</p> <p>9 CHIEF JUDGE SLEDGE: Well, didn't you state</p> <p>10 also that not only would it be close to it, but, from</p> <p>11 your analysis, it could not be lower than what you</p> <p>12 have suggested?</p> <p>13 THE WITNESS: Given that cost and revenue</p> <p>14 structure that I assume, yes.</p> <p>15 BY MR. HANDZO:</p> <p>16 Q Now, if there were steps that Live could take</p> <p>17 now to improve its profitability per ATH that required</p> <p>18 additional investment, you are aware that Live has</p> <p>19 ample resources to make that additional investment,</p> <p>20 aren't you?</p> <p>21 A I don't know what you mean by ample, but I</p> <p>22 believe they have some investment funds.</p>	<p>1150</p> <p>1 A It has some cash on hand to make necessary</p> <p>2 investments.</p> <p>3 MR. HANDZO: Your Honor, I would move the</p> <p>4 admission of SoundExchange Trial Exhibit 25.</p> <p>5 CHIEF JUDGE SLEDGE: Any objection to</p> <p>6 Exhibit 25?</p> <p>7 MR. MacDONALD: No objection to the</p> <p>8 admissibility of Exhibit 25, Your Honor. However, I</p> <p>9 would request an application of the protective order</p> <p>10 with respect to SoundExchange Trial Exhibit 25 and the</p> <p>11 testimony that was just provided.</p> <p>12 CHIEF JUDGE SLEDGE: Without objection, the</p> <p>13 exhibit is admitted.</p> <p>14 (SoundExchange Trial Exhibit Number 25 was</p> <p>15 received into evidence.)</p> <p>16 CHIEF JUDGE SLEDGE: Any response to the</p> <p>17 motion.</p> <p>18 MR. HANDZO: No objection, Your Honor.</p> <p>19 CHIEF JUDGE SLEDGE: Motion is granted.</p> <p>20 BY MR. HANDZO:</p> <p>21 Q Let me just for a second, Dr. Fratrik, come</p> <p>22 back to your table 2.</p>

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<p>1151</p> <p>1 A Are we finished with Exhibit 25? 2 Q Yes, we're finished with that one. 3 I take it, then, it is your opinion, based on 4 your data in table 2, that Live365 would lose money 5 for its webcasting operations even at the royalty you 6 propose, unless it was somehow able to improve its 7 profitability per ATH, correct? 8 A Using the fiscal year 2008 number, yes, 9 that's correct. 10 Q Okay. Now, your rate proposal doesn't 11 increase the rates over the course of the rate term, 12 correct? 13 A No, it does not. 14 Q And that is because you predict that, on a 15 per performance basis, there is little hope that the 16 overall economic picture will significantly improve 17 for commercial webcasters, right? 18 A I have two reasons. I think that there is 19 still a lot of competitive pressure for a typical 20 webcaster, but I also have -- believe that the rate 21 that I propose used the highest industry estimates for 22 advertising revenue. So I think there's some room</p>	<p>1153</p> <p>1 A Some of their subscription revenue data, yes. 2 Q Okay. And -- but what you're telling us is 3 you think the relationship between Live's costs and 4 Live's revenues could change in the future at Live's 5 option, right? 6 A It could, if it made some decisions. 7 Q And that would change the results of your 8 modeling, wouldn't it? 9 A It would change the results of table 2 if we, 10 five years from now, did an equivalent of table 2 and 11 said, okay, what was Live365 fiscal year 2013 numbers, 12 and so on, if the .0009 lower rate was adopted? 13 Q Well, it might also change numbers in other 14 tables, right? 15 A It may, but once again -- and I hate to sound 16 repetitive, but the table 5, which I'm basing my 17 proposal on, is using a very high estimate of total 18 advertising revenues. 19 Q But it's using Live's costs, right? 20 A It is using Live's costs. 21 Q So if those change in a way that made Live 22 more profitable, the numbers in your table 5 would</p>
<p>1152</p> <p>1 there for some increased performance for a typical 2 webcaster. 3 Q Okay. So are you saying, then -- do you 4 think Live has some ability to improve its 5 profitability that nobody else has? 6 A Certainly not that nobody else has because 7 other people could also improve their ability at that 8 lower rate. 9 Q Well, if webcasters generally were able to 10 improve their profitability as you suggest, wouldn't 11 that change all of the numbers in your tables in your 12 testimony? 13 A I think, as I just stated, that I think the 14 using the upper bound of the industry estimate allows 15 some sort of leeway for improvement in the revenue 16 picture of a typical webcaster. 17 Q Well, but Dr. Fratrik, you've based your 18 model on numbers that you actually got from Live, 19 right? 20 A Cost data, yes. 21 Q Right. Also some of Live's revenue data, 22 right?</p>	<p>1154</p> <p>1 have to change, too? 2 A Yes, but I believe that Live365 is a very 3 mature webcaster, being in the business for ten years, 4 so I think -- I can't imagine, especially after the 5 last few years of trying to ring out any costs and 6 keep cost down as possible [sic], that there really 7 would be that much potential cost savings that I think 8 you are suggesting. 9 Q Well, I thought you told me 15 minutes ago 10 that Live has some way to make itself more profitable 11 if it chooses to, right? 12 A Under a lower royalty rate, yes. 13 Q But apparently that doesn't include lowering 14 its costs? 15 A It has tried to lower its costs in very 16 recent years and -- and it remained about the same 17 profitability. 18 JUDGE WISNIEWSKI: Dr. Fratrik, let me ask 19 you about that, in terms of lowering its costs. Has 20 Live, in fact, engaged in putting some cap on 21 bandwidth for certain customers? 22 THE WITNESS: Yes, it had put in some</p>

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<p>1155</p> <p>1 controls to limit the number of aggregate tuning 2 hours. 3 JUDGE WISNIEWSKI: And what is that aimed at 4 doing? 5 THE WITNESS: In some sense, it's aimed to 6 minimize the amount of performance royalty payment 7 that they have and just make sure that there isn't -- 8 that the level at which they're operating isn't too 9 oppressive. 10 JUDGE WISNIEWSKI: Well, is that the only 11 reason why one would want to control that bandwidth? 12 Isn't it an issue of cost relative to revenue for the 13 use of that bandwidth? 14 THE WITNESS: Well, certainly, yes, I mean, 15 insofar as that I've shown that the prices that 16 commercial webcasters are generating are lower, so in 17 response to the more competitive marketplace, they 18 could possibly have -- if they weren't able to sell 19 out as many advertising spots, if they were getting 20 lower rates than the -- having so many more aggregate 21 tuning hours. 22 JUDGE WISNIEWSKI: Do you know if they've put</p>	<p>1157</p> <p>1 Q Let me ask you to turn now, Dr. Fratrik, to 2 your table 4. That's on page 26 of your testimony. 3 A Yes. 4 Q And am I correct that this is basically the 5 same model as we just looked at in table 2 except now 6 you're using industry-wide advertising revenues 7 instead of Live365 advertising revenues? 8 A It's a total industry revenue estimate for 9 webcasting, yes. 10 Q From the Accustream report? 11 A Yes. 12 Q And what we see, looking at the results of 13 this table, is that if we use those estimates of 14 advertising revenue from Accustream, the imputed 15 royalty is even lower than if we just look at 16 Live365's data, right? 17 A That's correct. 18 Q So if we used this data from Accustream as 19 the basis to set a rate, the court would have to 20 conclude that the only rate it could set for any 21 operating margin for the webcasters would be a 22 negative royalty, right?</p>
<p>1156</p> <p>1 that bandwidth cap on all their customers or certain 2 of their customers? 3 THE WITNESS: I believe they put it on the 4 non-subscriber customers. 5 JUDGE WISNIEWSKI: All of the non-subscriber 6 customers? 7 THE WITNESS: I believe so. I think so. 8 JUDGE WISNIEWSKI: Do you know if that had 9 any selective consequence as to the genres involved 10 and the channels affected? 11 THE WITNESS: I don't know. 12 JUDGE WISNIEWSKI: Thank you. 13 BY MR. HANDZO: 14 Q Would it be fair to say, Dr. Fratrik, that 15 when Live tried to limit the ATH, it was trying to 16 limit the ATH for the part of its business that it 17 thought was least profitable, brought the least 18 revenue? 19 A I believe that by taking -- putting the 20 controls on the non-subscribers, yes, I think they 21 were trying to make an economic decision about who 22 would be the most profitable listeners.</p>	<p>1158</p> <p>1 A Well, like I have -- that they wouldn't be 2 earning any profitability. 3 Q Well, in order for them to even break even, 4 the record companies would have to pay them, right? 5 A Under that scenario, yes, for that particular 6 one year. 7 Q Well -- and to be clear, you occasionally 8 qualify your answer by saying it's for this particular 9 year. But this year, 2008, is what you're using to 10 project a royalty out through 2015, right? 11 A Yes. I'm utilizing the ZenithOptimedia 12 industry revenue numbers. 13 CHIEF JUDGE SLEDGE: I'm sorry. I didn't 14 understand the answer to respond to the question. 15 THE WITNESS: He asked me whether or not I 16 was using 2008, and I said yes, but I clarified it 17 that I'm using 2008 and the ZenithOptimedia industry 18 revenue estimates for my proposal. 19 CHIEF JUDGE SLEDGE: Thank you. 20 BY MR. HANDZO: 21 Q Am I correct in understanding table 4 to 22 essentially tell us that if you use the Accustream</p>

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1159	<p>1 data that you use here in table 4, no webcaster would 2 stay in the business, right? 3 A Unless they thought that their revenue 4 profile would get -- would improve over time. 5 Q Okay. But you just told us you don't think 6 that's going to happen, right? 7 A I said that there's competitive pressures on 8 webcasting. I didn't necessarily say that webcasting 9 wouldn't improve. 10 Q I thought your testimony that your rate 11 doesn't increase over the term of the license was 12 based on the premise that the profitability of the 13 webcaster is not going to change over that time? 14 A What I -- my proposal is utilizing the 15 ZenithOptimedia revenue per ATH, and you're looking at 16 the table 4 with a much lower revenue per ATH. So my 17 proposal has some leeway there, so as -- in moving up 18 from this table in terms of revenue per ATH. 19 Q Okay. I do understand that your rate 20 proposal is based on the ZenithOptimedia data. But I 21 just want to stick with table 4 for a moment, which is 22 the Accustream data. And I just want to make sure</p>
1160	<p>1 that I'm understanding this correctly. If you tried 2 to base a rate based on that Accustream data, the rate 3 would have to be negative in order for anyone to be 4 willing to buy, right? That's what this is telling 5 us? 6 A If we utilize that table, yes, that would be 7 it. 8 Q Okay. 9 JUDGE ROBERTS: And, Mr. Handzo, so that I'm 10 clear on this, you mean the revenue being negative -- 11 is this telling me, Dr. Fratrik, that in order for 12 Live365 to earn the 20 percent return rate, that 13 record companies would have to pay Live365 8/100ths of 14 a penny for use of the -- per performance in order to 15 get to that 20 percent rate? 16 THE WITNESS: If Live365 was earning that 17 revenue per ATH. But they're earning somewhat higher 18 than that in 2008. And what I'm suggesting is that, 19 moving forward, that that -- I don't think they would 20 obtain that rate from the record company. So I think 21 that they would have to determine over time whether or 22 not to stay in the business and -- while losing money.</p>
1161	<p>1 JUDGE ROBERTS: But again, according to your 2 chart, to get a 20 percent return, the record company 3 would have to pay Live365 8/100ths of a cent per 4 performance? 5 THE WITNESS: The typical webcaster, yes. 6 JUDGE ROBERTS: Okay. 7 BY MR. HANDZO: 8 Q So I take it, Dr. Fratrik you're not 9 recommending that the court rely on this Accustream 10 data, right? 11 A No, I'm not. 12 MR. HANDZO: Judge, I'm moving on to at least 13 a slightly new topic. I'm happy to keep going or -- I 14 wanted to see if the court wanted to break for lunch 15 now. 16 CHIEF JUDGE SLEDGE: We can go ahead and stop 17 now. We'll recess for one hour. 18 (Whereupon, at 12:15 p.m., a lunch recess was 19 taken.) 20 21 22</p>
1162	<p>1 AFTERNOON SESSION 2 (1:21 p.m.) 3 CHIEF JUDGE SLEDGE: Thank you. We'll come 4 to order. I warn you that lunch oftentimes 5 re-energizes people and gives them new vim and vigor 6 that they didn't have before so -- you may not be 7 wearing down people when we have that. 8 Mr. Handzo? 9 MR. HANDZO: Thank you, Your Honor. 10 BY MR. HANDZO: 11 Q Dr. Fratrik, let me ask you to turn now to 12 page 28 of your written testimony and table 5 on that 13 page. Do you have that? 14 A Yes, I'm right there. 15 Q So this is now the table on which you base 16 your proposed rate, correct? 17 A Yes. 18 Q And what this table shows us is that if a 19 webcaster were willing to accept a 5 percent operating 20 margin, the derived sound recording royalty rate would 21 be .0018 dollars per performance, correct? 22 A That's what I would predict if they were</p>

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1163	<p>1 going to accept that 5 percent, yes.</p> <p>2 Q Okay. And the rate that this court set</p> <p>3 previously for 2008 is, in fact, lower than that,</p> <p>4 correct?</p> <p>5 A Yes, it is.</p> <p>6 Q It's .0014, right?</p> <p>7 A That is correct, yes.</p> <p>8 Q Now, if a webcaster were willing to accept a</p> <p>9 10 percent operating margin, this table would show us</p> <p>10 that the appropriate royalty rate, according to your</p> <p>11 calculation, would be .0015 dollars per performance,</p> <p>12 right?</p> <p>13 A That's correct.</p> <p>14 Q So that would still be higher than the rate</p> <p>15 that was set by this court for 2008, right?</p> <p>16 A Yes.</p> <p>17 Q So if the court were to accept this model and</p> <p>18 your table 5 but were to conclude that a 5 or</p> <p>19 10 percent operating margin is appropriate, in fact,</p> <p>20 it would have to conclude that the court set the rates</p> <p>21 too low in Web II, correct?</p> <p>22 A I think, in hindsight, it may have set it too</p>	1165	<p>1 optimal number? Where did you get that from?</p> <p>2 THE WITNESS: I looked at other companies, in</p> <p>3 particular some public radio companies. I think</p> <p>4 that's included in table 2 of my testimony. And</p> <p>5 those -- table 3, excuse me, on page 22. And those</p> <p>6 operating margins for those terrestrial radio</p> <p>7 companies average a little bit higher than that, 23 to</p> <p>8 25 percent depending on whether or not you used a</p> <p>9 median or average. And I think that that's a</p> <p>10 reasonable rate of return for a webcaster.</p> <p>11 JUDGE ROBERTS: And why did you look at</p> <p>12 public radio?</p> <p>13 THE WITNESS: Public radio companies are in a</p> <p>14 similar type of business, selling entertainment, and</p> <p>15 their main source of revenue is advertising.</p> <p>16 JUDGE ROBERTS: I'm sorry. I was a little</p> <p>17 unclear there. What you're meaning is publicly held?</p> <p>18 THE WITNESS: Publicly held, right.</p> <p>19 JUDGE ROBERTS: I thought I heard you say</p> <p>20 public radio, as in non-commercial. My apologies.</p> <p>21 Go ahead, Mr. Handzo.</p> <p>22 MR. HANDZO: Thank you.</p>
1164	<p>1 low for 2008, assuming that the revenue per ATH is at</p> <p>2 that .0872 level.</p> <p>3 Q Okay. Thank you.</p> <p>4 Now, Dr. Fratrik, you told us earlier that,</p> <p>5 in your opinion, the -- your proposed rate of .0009</p> <p>6 dollars -- I'm sorry, .009 dollars per performance is</p> <p>7 the right number because you believe that in the</p> <p>8 willing buyer/willing seller marketplace, the buyers</p> <p>9 would require a rate that gives them a 20 percent</p> <p>10 operating margin, correct?</p> <p>11 A That's correct.</p> <p>12 Q And is it -- it is your opinion, I take it,</p> <p>13 then, that a buyer in this market will not pay a rate</p> <p>14 higher than your proposed rate, even if that's all</p> <p>15 that's offered, unless it can earn an operating margin</p> <p>16 of at least 20 percent, right?</p> <p>17 A The typical commercial webcaster would not</p> <p>18 purchase that. It could be webcasters that earn more</p> <p>19 per ATH.</p> <p>20 Q Okay. But --</p> <p>21 JUDGE ROBERTS: One minute, Mr. Handzo.</p> <p>22 Dr. Fratrik, why is a 20 percent return the</p>	1166	<p>1 BY MR. HANDZO:</p> <p>2 Q Dr. Fratrik, you don't have any evidence to</p> <p>3 show that a webcaster would refuse to license sound</p> <p>4 recordings unless it could earn a 20 percent return,</p> <p>5 right?</p> <p>6 A Insofar as that there were -- can you repeat</p> <p>7 the question?</p> <p>8 Q Sure. You do not have any evidence, do you,</p> <p>9 that a webcaster would refuse to license sound</p> <p>10 recordings unless it could pay a royalty that gave it</p> <p>11 a 20 percent operating return?</p> <p>12 A What I'm saying is that when determining what</p> <p>13 to purchase, the webcaster would incorporate having a</p> <p>14 20 percent operating margin in order to -- in its</p> <p>15 negotiations.</p> <p>16 Q My question, Dr. Fratrik, is this: Do you</p> <p>17 have any evidence that actual webcasters would require</p> <p>18 a 20 percent operating return?</p> <p>19 A I don't have any evidence that actual</p> <p>20 webcasters -- insofar as calculating that, yes.</p> <p>21 Q Okay. Are you aware of any webcaster</p> <p>22 currently in the market that's earning an operating</p>

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1167	<p>1 margin of 20 percent?</p> <p>2 A I'm not aware of any ones.</p> <p>3 Q Including Live, right?</p> <p>4 A Including Live.</p> <p>5 Q And you would not, in fact, counsel Live365</p> <p>6 to exit this market if this court set a rate that did</p> <p>7 not allow Live to earn a 20 percent operating margin,</p> <p>8 would you?</p> <p>9 A It would depend upon what Live's contracts</p> <p>10 are, what their opportunities are in terms of whether</p> <p>11 or not the equipment that they have is paid for and</p> <p>12 other obligations that they have about whether or not</p> <p>13 to maintain -- stay in the business for a while.</p> <p>14 Q So is the answer to my question "I don't</p> <p>15 know"?</p> <p>16 A The answer to your question about whether or</p> <p>17 not I would counsel them is it would depend upon more</p> <p>18 information about their situation, and then I could</p> <p>19 counsel them on that.</p> <p>20 Q Right. And you don't currently have that</p> <p>21 information, right?</p> <p>22 A Right now I don't have that information.</p>	1169	<p>1 Q Okay. The barriers to entry for terrestrial</p> <p>2 radio are far higher, are they not?</p> <p>3 A Insofar as that there's a limited number of</p> <p>4 radio allotments than radio stations out there, yes.</p> <p>5 You need a FCC license.</p> <p>6 Q So if I want to be a terrestrial radio</p> <p>7 broadcaster, one thing I have to do is acquire an FCC</p> <p>8 license, right?</p> <p>9 A Or purchase an existing station, yes.</p> <p>10 Q Right. And I think you just mentioned this,</p> <p>11 those licenses are -- there are only a limited number</p> <p>12 for any geographic area, right?</p> <p>13 A That's true.</p> <p>14 Q And actually, at the present time, there</p> <p>15 aren't any available anywhere, are there?</p> <p>16 A I think there may be some unspoken-for</p> <p>17 allotments that nobody really wants to purchase in</p> <p>18 remote areas.</p> <p>19 Q But not in urban areas, for example?</p> <p>20 A No, I don't think so.</p> <p>21 Q So actually, if I wanted to enter the</p> <p>22 business of being a terrestrial radio broadcaster, the</p>
1168	<p>1 Q So the answer to my question is you don't</p> <p>2 know?</p> <p>3 CHIEF JUDGE SLEDGE: Go ahead, Mr. Handzo.</p> <p>4 He's already answered.</p> <p>5 MR. HANDZO: Thank you.</p> <p>6 BY MR. HANDZO:</p> <p>7 Q Now, in response to questions from Judge</p> <p>8 Roberts you said that you base this 20 percent return</p> <p>9 on terrestrial broadcasting stations, right?</p> <p>10 A One thing, yes.</p> <p>11 Q Okay. Well, that's the only thing, isn't it?</p> <p>12 A That was the thing I looked at to sort of set</p> <p>13 a benchmark, yes.</p> <p>14 Q Now, you would agree with me, wouldn't you,</p> <p>15 Dr. Fratrik, that webcasting has low barriers to</p> <p>16 entry, correct?</p> <p>17 A Webcasters have -- can get the tools and</p> <p>18 equipment pretty easily. There's no government</p> <p>19 license to start webcasting.</p> <p>20 Q So the answer is yes, it has low barriers to</p> <p>21 entry?</p> <p>22 A It has relatively low barriers to entry.</p>	1170	<p>1 only way I could get an FCC license is to buy an</p> <p>2 existing radio broadcast station, right?</p> <p>3 A Yes.</p> <p>4 Q And that constitutes a significant barrier to</p> <p>5 entry, dent it?</p> <p>6 A That is one barrier to entry, yes.</p> <p>7 Q It's a very expensive barrier to entry, isn't</p> <p>8 it?</p> <p>9 A Not as expensive as it used to be.</p> <p>10 Q If it's going to be, for an urban area, tens</p> <p>11 of millions of dollars, right?</p> <p>12 A Depending upon the type of station?</p> <p>13 Q Yes.</p> <p>14 A There are some stations that go for tens of</p> <p>15 millions of dollars.</p> <p>16 Q Okay. Wouldn't you expect that an industry</p> <p>17 with low barriers to entry is going to earn lower</p> <p>18 margins, on average, than an industry with high</p> <p>19 barriers to entry?</p> <p>20 A All else equal, yes.</p> <p>21 Q And similarly, isn't it true that an industry</p> <p>22 with high capital costs is going to tend to earn</p>

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1171	<p>1 higher margins than an industry with low capital 2 costs, right? 3 A All else equal, yes. 4 Q Now, if I want to become a webcaster, and I 5 want to webcast through Live365, my upfront cost is 6 paying Live365 ten bucks, right? 7 A I believe there are some equipment, some 8 technical know how you have to do, getting services, 9 getting programming. I think there are more than just 10 \$10. 11 Q Okay. But it's not -- it's going to be under 12 a thousand, let's say, right? 13 A I don't know the answer to that. 14 Q All right. And my capital cost of getting 15 into radio broadcasting in an urban area could be tens 16 of millions, rights? 17 A Could be less also, yes. 18 Q But it's fair to say that terrestrial radio 19 broadcasters are going to have higher capital costs 20 than webcasters, right? 21 A In some areas, yes. 22 Q In urban areas, right?</p>	1173	<p>1 Q Now, Dr. Fratrik, in coming up with your 2 opinion that a willing buyer in our hypothetical 3 market would insist on a 20 percent return, did you 4 look at what kind of returns are earned for other 5 digital businesses? 6 A No, I did not. 7 Q Are you aware, for example, that Amazon earns 8 about a 4.8 percent operating return? 9 A I think I saw a document recently attesting 10 to that. 11 Q Well, let's see if we can refresh your 12 recollection. 13 MR. HANDZO: May I approach, Your Honor? I'm 14 handing what we've marked as SoundExchange Exhibits 31 15 through 36. 16 BY MR. HANDZO: 17 Q Dr. Fratrik, when you tried to figure out 18 what the operating margins were for terrestrial 19 broadcasters, you actually went to Yahoo! Finance, 20 right? 21 A That's correct. 22 Q Which is where these documents come from,</p>
1172	<p>1 A Urban areas, radio stations tend to be more 2 expensive because they reach more people. 3 Q And so, there, there's no doubt that capital 4 costs for terrestrial broadcasters are higher than 5 webcasters, right? 6 A When you say capital costs, are you meaning 7 the actual physical equipment capital cost? 8 Q Let's start with that. 9 A The capital cost of transmitting in a 10 small -- non-urban area is basically the same as in 11 the urban area. Your transmitter and other equipment 12 is the same. 13 Q But as we discussed earlier, if I'm a 14 terrestrial broadcaster, I also have the upfront 15 capital cost of acquiring the station or acquiring the 16 license, right? 17 A I refer to that as an investment. 18 Q Well, what we talked about with capital costs 19 would be true of investments, too; the higher 20 investment or capital cost, the larger the operating 21 margin you're likely to see for that industry, right? 22 A Surely.</p>	1174	<p>1 right? 2 A Yep. 3 Q And if you look at the first one that I've 4 handed you, SoundExchange Trial Exhibit 31, that 5 indicates that Amazon earns an operating margin of 6 4.81 percent, correct? 7 A That's what it says, yes. 8 Q And if you turn to the next one, 32, it shows 9 that eFlowers [sic] has an operating margin of 10 1.55 percent? 11 A Yes, that's what it says. 12 Q Exhibit 33 indicates that overstock.com has 13 an operating margin of .1 percent? 14 A That's what it reports. 15 Q Exhibit 34 shows that bidz.com has an 16 operating margin of 3.94 percent. Do you see that? 17 A That's correct. 18 Q Fair to say, then, that at least from these 19 documents, companies that are doing business on the 20 Internet tend to have far lower operating margins than 21 the ones you suggest for the webcasting business? 22 A Yes, but I think these are very different</p>

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1175	<p>1 types of companies than a commercial webcaster. 2 Q Well, they're companies that are in digital 3 business on the Internet, right? 4 A Sure. There's lots of different types of 5 customers -- different types of companies on the 6 Internet. 7 Q But the only thing you looked at in order to 8 figure out what an appropriate operating return was 9 was terrestrial radio, right? 10 A I looked at the terrestrial radio companies 11 because they are similar in nature in terms of the 12 business that they're operating in. 13 Q Now, did you look at the operating margins 14 for record companies? 15 A No, I did not. 16 Q Let me ask you to look at SoundExchange Trial 17 Exhibit 36. 18 A 36 or 35? 19 Q Let's go to 36 first. 20 A Okay. 21 Q Do you see there that Warner Music Group 22 earns an operating margin of 4.4 percent?</p>	1177	<p>1 There's no authentication. 2 CHIEF JUDGE SLEDGE: Mr. Handzo? 3 MR. HANDZO: Well, Your Honor, with respect 4 to the Yahoo! Finance documents, these are all 5 documents of the same type from the same website that 6 he used for his own information. So since he was 7 relying on this site for his own, it seems to me 8 acceptable to admit it for other companies as well. 9 CHIEF JUDGE SLEDGE: Anything further? 10 MR. MacDONALD: No, Your Honor. 11 CHIEF JUDGE SLEDGE: The objection is 12 sustained. 13 BY MR. HANDZO: 14 Q Dr. Fratrik, let me ask you to go back to 15 your table 2 for a moment. 16 JUDGE ROBERTS: Before you do that, 17 Mr. Handzo, looking at table 3 of your testimony, 18 Dr. Fratrik, do you know if any of the revenues 19 included in this table for these different radio 20 companies includes revenues obtained through 21 simulcasting? 22 THE WITNESS: I believe so. I believe</p>
1176	<p>1 A That's what it says, yes. 2 Q And then if you go back to Exhibit 35, let me 3 direct your attention to the seventh page, about 4 midway down the page. 5 A Yes. 6 Q Do you see that EMI earns an operating profit 7 margin of 5.7 percent? 8 A I see a 5.27 percent. 9 Q I'm sorry, 5.27. 10 A I'm also a little surprised by that because, 11 on the last page, on page 12, there's a profit margin 12 of 35.82 percent also listed in this document. 13 Q So I guess we need someone from EMI to tell 14 us about that one. 15 A Unless you want to support a 35 percent. 16 MR. HANDZO: Your Honor, I'd move the 17 admission of SoundExchange Trial Exhibits 31 through 18 36. 19 CHIEF JUDGE SLEDGE: Any objection to 20 Exhibits 31 through 36? 21 MR. MacDONALD: Yes, Your Honor, there's no 22 authentication here. And -- I'll leave it at that.</p>	1178	<p>1 several of the publicly traded radio companies are 2 engaged in simulcasting. 3 JUDGE ROBERTS: But do you know what 4 percentage of total revenues that consists of? 5 THE WITNESS: No, I don't. 6 JUDGE ROBERTS: Do you have any idea if it's 7 a large percentage or a small -- 8 THE WITNESS: I don't think it's a large 9 percentage because obviously simulcasting has just 10 started in the most recent few years, so I suspect 11 that the majority of their revenues are from their 12 over-the-air transmissions. 13 JUDGE ROBERTS: Okay. Thank you. 14 JUDGE WISNIEWSKI: Dr. Fratrik, in using 15 these terrestrial radio companies as your barometer, 16 if you will, for the operating margin that you assume 17 in your model, I thought I heard you say that it was 18 because they were similarly involved in the general 19 industry that these webcasters are involved in. Am I 20 paraphrasing you incorrectly? 21 THE WITNESS: No, you're paraphrasing me 22 correctly. They're in the business of attracting</p>

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<p>1 audiences and selling the availability of those</p> <p>2 audiences to advertisers.</p> <p>3 JUDGE WISNIEWSKI: Later in your testimony,</p> <p>4 you say there are vastly different economics</p> <p>5 associated with terrestrial commercial radio</p> <p>6 broadcasters.</p> <p>7 THE WITNESS: I say that insofar as when you</p> <p>8 are examining the economics of terrestrial radio</p> <p>9 broadcasters who are now involved in webcasting. In</p> <p>10 that section later on I'm contrasting the cost and</p> <p>11 revenue structure of commercial webcasters with</p> <p>12 terrestrial radio broadcasters who then add another</p> <p>13 line of business, simulcasting via their webcasts.</p> <p>14 JUDGE WISNIEWSKI: I'm not quite sure why</p> <p>15 it's appropriate in one place and not another since</p> <p>16 what we're talking about is webcasters here, and</p> <p>17 you're using this to try and gauge what the proper</p> <p>18 operating margin is for a webcaster.</p> <p>19 THE WITNESS: Well, in the latter part of my</p> <p>20 study when I'm comparing the economics of commercial</p> <p>21 terrestrial radio broadcasters with webcasters, I want</p> <p>22 to try and contrast the revenue and costs of those</p>	<p>1 whole lot of sense. Why don't we continue and we'll</p> <p>2 see where we come out.</p> <p>3 BY MR. HANDZO:</p> <p>4 Q Dr. Fratrik, let me take you back to your</p> <p>5 table 2.</p> <p>6 A Are we finished with these?</p> <p>7 Q Yes. Table 2 on page 21. Now, you</p> <p>8 understand, don't you, that the rates currently in</p> <p>9 effect for webcasting are higher than the value per</p> <p>10 performance that you're showing in the bottom row of</p> <p>11 this table, correct?</p> <p>12 A Yes, I am.</p> <p>13 Q And so at the current rates, if this table is</p> <p>14 right, Live is not making money on webcasting, right?</p> <p>15 A Well, this is not -- table 2 is not Live.</p> <p>16 Q I thought table 2 was the Live costs and</p> <p>17 revenues.</p> <p>18 A Oh, I'm sorry, you're right. Excuse me.</p> <p>19 Table 2 is Live and, at this point in time, Live is</p> <p>20 not generating those revenues -- their profit margin.</p> <p>21 Q You're aware that, overall, Live365 is a very</p> <p>22 profitable company, right?</p>
1180	1182
<p>1 commercial broadcasters who are webcasting and</p> <p>2 focusing on their webcasting aspect of it.</p> <p>3 Here, I'm saying that, in their main</p> <p>4 business, the over-the-air transmission, when they are</p> <p>5 trying to attract audiences by providing programming</p> <p>6 by hiring staff, et cetera, that's much more similar</p> <p>7 to the typical commercial webcaster.</p> <p>8 JUDGE WISNIEWSKI: I find it difficult to</p> <p>9 have the one comparison be appropriate in one place</p> <p>10 but not in another when you're, in both cases, trying</p> <p>11 to compare with commercial webcasters.</p> <p>12 THE WITNESS: I think in --</p> <p>13 JUDGE WISNIEWSKI: I'm not sure you can have</p> <p>14 it both ways.</p> <p>15 THE WITNESS: I think what I'm trying to do,</p> <p>16 Your Honor, is in the second case is to sort of</p> <p>17 evaluate an agreement under the WSA and say whether or</p> <p>18 not that is a relevant benchmark to utilize in the</p> <p>19 proceeding.</p> <p>20 JUDGE WISNIEWSKI: I understand what you're</p> <p>21 offering it for. I'm just trying to understand the</p> <p>22 logic in terms of your reasoning, whether it makes a</p>	<p>1 A What's your definition of very profitable?</p> <p>2 Q All right. Well, let's put some numbers on</p> <p>3 it. Why don't you turn to Exhibit 10 to your</p> <p>4 testimony. And this shows us, does it not, that for</p> <p>5 2008, the year we were just looking at in table 2,</p> <p>6 Live overall had an operating profit of a little over</p> <p>7 \$1.4 million, right?</p> <p>8 A For all of its lines of businesses, yes.</p> <p>9 Q It's about 14 percent of revenue?</p> <p>10 A Of all of their revenues, yes.</p> <p>11 Q And in fact, they've been profitable every</p> <p>12 year shown on this table, correct, overall?</p> <p>13 A They do have an operating profit, positive</p> <p>14 operating profit, during those four fiscal years.</p> <p>15 Q And most recently in 2009, they have an</p> <p>16 operating profit of a little over a million dollars,</p> <p>17 right, for their business as a whole?</p> <p>18 A For the business as a whole, yes.</p> <p>19 Q Which would be an operating margin of maybe</p> <p>20 around 11 percent?</p> <p>21 A Without a calculator, I can't say, but it</p> <p>22 looks about that range, yes.</p>

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1183	<p>1 Q And I think you indicated earlier 2009 has</p> <p>2 been kind a tough year for everybody economically,</p> <p>3 right?</p> <p>4 A It was certainly a tough year in the</p> <p>5 advertising marketplace in the economy as a whole.</p> <p>6 Q And, nevertheless, Live overall has earned</p> <p>7 about an 11 percent operating margin in 2009, right?</p> <p>8 A From its entire business line, yes.</p> <p>9 Q And those numbers, as you understand them,</p> <p>10 reflect accruing the current copyright royalty rates</p> <p>11 for sound recordings at the rate currently set by this</p> <p>12 court, right?</p> <p>13 A I believe that's included in this income</p> <p>14 statement, yes.</p> <p>15 Q So this shows, overall, the business being</p> <p>16 profitable at the rates currently in effect set by</p> <p>17 this court?</p> <p>18 A For both lines of businesses combined, yes.</p> <p>19 Q Now, since your Exhibit 10 shows that,</p> <p>20 overall, Live is earning an 11 to 14 percent margin</p> <p>21 over the last couple of years, but the webcasting</p> <p>22 business, according to you, is unprofitable, the</p>	1185	<p>1 in that ballpark.</p> <p>2 CHIEF JUDGE SLEDGE: Mr. Handzo, let me</p> <p>3 interrupt just a moment.</p> <p>4 Your answer very recently of excluding the</p> <p>5 broadcasting services from your model, what was the</p> <p>6 reason for that?</p> <p>7 THE WITNESS: The reason for that is because</p> <p>8 I'm trying to analyze a model of the Internet radio</p> <p>9 service that Live365 is involved in, not the</p> <p>10 broadcaster services part.</p> <p>11 CHIEF JUDGE SLEDGE: In making that</p> <p>12 statement, are you considering the broadcasting</p> <p>13 services to be services provided to broadcasters?</p> <p>14 THE WITNESS: To webcasters, yes.</p> <p>15 CHIEF JUDGE SLEDGE: To webcasters?</p> <p>16 THE WITNESS: Yes, that's -- the common use</p> <p>17 in this area is that the webcasters are called</p> <p>18 broadcasters also. It's a little --</p> <p>19 CHIEF JUDGE SLEDGE: You may say that's</p> <p>20 common, but it's never been -- in four years of</p> <p>21 hearing evidence, it's never been said so before</p> <p>22 yesterday before this proceeding -- this body, which</p>
1184	<p>1 difference there is that when you do your table 2,</p> <p>2 you're omitting what you refer to as the broadcasting</p> <p>3 business, right?</p> <p>4 A I don't model the broadcasting services, yes.</p> <p>5 Q And, in fact, you exclude all the revenues</p> <p>6 from what you characterize as the broadcasting</p> <p>7 business, correct?</p> <p>8 A That's because I'm trying to model the</p> <p>9 Internet radio business of Live365.</p> <p>10 Q Okay. So you did exclude the broadcaster</p> <p>11 revenues, right?</p> <p>12 A Yes.</p> <p>13 Q Now, if, according to you, the webcasting</p> <p>14 part of the business is unprofitable and the overall</p> <p>15 business has an operating profit of 11 to 14 percent,</p> <p>16 I guess we could conclude that the broadcasting part</p> <p>17 of the business is really quite profitable, right?</p> <p>18 A The broadcasting services part of the</p> <p>19 business is profitable, yes.</p> <p>20 Q I mean, probably margins around 30 to</p> <p>21 35 percent, right?</p> <p>22 A I would have to look at that to see if it's</p>	1186	<p>1 was quite a surprise to hear that kind of confusion of</p> <p>2 the terms. But the way you've used it for</p> <p>3 broadcasting services, that includes services provided</p> <p>4 to webcasters?</p> <p>5 THE WITNESS: Yes.</p> <p>6 CHIEF JUDGE SLEDGE: All right. I'm sorry</p> <p>7 for the interruption.</p> <p>8 BY MR. HANDZO:</p> <p>9 Q Dr. Fratrik, if it's right that what you've</p> <p>10 characterized as a webcasting business is unprofitable</p> <p>11 and what you've characterized as the broadcasting</p> <p>12 business is earning, you know, 30 to 35 percent</p> <p>13 margins, wouldn't that suggest that Live should just</p> <p>14 get out of the webcasting business?</p> <p>15 A It depends upon what their expectations are</p> <p>16 in terms of the future of the webcasting business.</p> <p>17 Q Well, they're not likely, even under your</p> <p>18 scenario, to get to a point where they're earning 30</p> <p>19 to 35 percent margins, right?</p> <p>20 A I don't know what their expectations are</p> <p>21 pending the decision of the proceeding.</p> <p>22 Q Well, let me then go back to the question of</p>

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1187	<p>1 how you went about separating out what you call the</p> <p>2 broadcaster business from what you call the webcaster</p> <p>3 business. Okay? I'm going to ask you to turn to</p> <p>4 table 1 which is on page 19 of your testimony.</p> <p>5 A Yes.</p> <p>6 Q Table 1 is where you calculate Live365's</p> <p>7 costs and revenues associated with what you call its</p> <p>8 webcaster business, right?</p> <p>9 A Yes.</p> <p>10 Q And the sort of costs per ATH that you</p> <p>11 calculate in table 1 for the webcaster business is</p> <p>12 what you later use in your tables 2, 4 and 5, right?</p> <p>13 A Correct.</p> <p>14 Q Now, in order to calculate what costs and</p> <p>15 revenues fell on the broadcaster side of the business</p> <p>16 and what costs and revenues fell on the webcaster side</p> <p>17 of the business, you got some financial documentation</p> <p>18 from Live365, didn't you?</p> <p>19 A That's correct.</p> <p>20 Q It was just several pages, right?</p> <p>21 A It was a lot of pages, I think, that is</p> <p>22 pretty much included in Exhibits 9 and 10.</p>	1189
1188	<p>1 Q Didn't you tell me in your deposition that</p> <p>2 you got three pages?</p> <p>3 A I don't remember whether there were three</p> <p>4 pages or...</p> <p>5 Q Dr. Fratrik, let me ask you to look at</p> <p>6 pages 122 and 123 of your deposition.</p> <p>7 A I'm there, yes.</p> <p>8 Q Okay. And do you see where I showed you Lam</p> <p>9 Exhibits 4 and 5?</p> <p>10 A Yes.</p> <p>11 Q And you said that's what you used as the</p> <p>12 basis for your cost allocations in table 1?</p> <p>13 A Yes.</p> <p>14 Q Those are each one-page documents, right?</p> <p>15 A Yes, they were.</p> <p>16 Q And then you said you got one other document,</p> <p>17 right?</p> <p>18 A Oh, yeah, the allocation of the royalty</p> <p>19 licensing fees.</p> <p>20 Q And then I asked you whether you got anything</p> <p>21 else that you used to prepare the allocations in</p> <p>22 table 1, and you said no.</p>	1190

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1191	<p>1 the business, right?</p> <p>2 A Are they purchasing -- yes.</p> <p>3 Q Yes. They're purchasing broadcast services</p> <p>4 from Live365, but they're paying the sound recording</p> <p>5 royalties themselves, right?</p> <p>6 A They're part of the Internet business of</p> <p>7 Live365, but they're not included in the aggregate</p> <p>8 tuning hours of Live365 for the royalty-bearing aspect</p> <p>9 of it.</p> <p>10 Q Right. So this person I'm calling Mr. Smith,</p> <p>11 the amount that Mr. Smith pays Live365 is not going to</p> <p>12 show up in the revenue on table 1, right?</p> <p>13 A Correct.</p> <p>14 Q Now, Mr. Smith's station, however, is going</p> <p>15 to show up on Live365's directory, isn't it?</p> <p>16 A Yes.</p> <p>17 Q So if I'm a consumer, if I'm a listener and I</p> <p>18 go to Live365, among other things, I'm going to see</p> <p>19 Mr. Smith's station, right?</p> <p>20 A Among many other stations, yes.</p> <p>21 Q Even though you're not including that as part</p> <p>22 of what you call the webcaster business, right?</p>
1192	<p>1 A Right.</p> <p>2 Q In fact, no listener could ever tell the</p> <p>3 difference between the stations you say are part of</p> <p>4 the broadcast business and the stations that you say</p> <p>5 are part of the webcast business, right?</p> <p>6 A They're both webcasting, yes.</p> <p>7 Q So no one -- no outsider could tell the</p> <p>8 difference, right?</p> <p>9 A Right.</p> <p>10 Q Now, isn't it true, Dr. Fratrik, that when</p> <p>11 Live markets to potential broadcasters -- that is, the</p> <p>12 potential Mr. Smiths out there -- one of the ways it</p> <p>13 promotes the broadcasting service is it tells people</p> <p>14 they have an opportunity to be part of their</p> <p>15 webcasting business, right?</p> <p>16 A Yes.</p> <p>17 Q In fact, let me show you what's previously</p> <p>18 been marked as SoundExchange Exhibit 14 which I</p> <p>19 believe is already in evidence. Dr. Fratrik, have you</p> <p>20 seen this before?</p> <p>21 A I may have looked at their website.</p> <p>22 Q And this appears to you to be a screen shot</p>
1193	<p>1 of part of Live365's website; is that right?</p> <p>2 A That's what it appears to be, yes.</p> <p>3 Q And this is a part of their website where</p> <p>4 they market to potential broadcasters, right?</p> <p>5 A Yep. Yes.</p> <p>6 Q And if you turn to the second page, they have</p> <p>7 some frequently asked questions?</p> <p>8 A Yes.</p> <p>9 Q One of them, number 1, is, "Why should I</p> <p>10 broadcast with Live365?"</p> <p>11 A Yes.</p> <p>12 Q And the first advantage -- or the first</p> <p>13 reason to broadcast with Live365 is, "Our site</p> <p>14 attracts 4 million plus listeners every month, and</p> <p>15 being listed in our directory provides exposure in and</p> <p>16 of itself," right?</p> <p>17 A Yes, it says that.</p> <p>18 Q And actually, if you go down to frequently</p> <p>19 asked question 13, you get much the same statement,</p> <p>20 right?</p> <p>21 A Excuse me while I look at the other ones.</p> <p>22 Q Sure, take your time.</p>
1194	<p>1 A Okay.</p> <p>2 Q Okay. So you would agree with me, wouldn't</p> <p>3 you, that for frequently asked question 13, again,</p> <p>4 Live repeats that one of the advantages of being a</p> <p>5 broadcaster with Live is that you get to be part of</p> <p>6 their webcasting network?</p> <p>7 A It also, in frequently asked question</p> <p>8 number 23, says that you do not have to be listed in</p> <p>9 their directory.</p> <p>10 Q But in 1 and 13 they say it's an advantage to</p> <p>11 be listed, right?</p> <p>12 A Yes, in the introductory paragraph 1, it uses</p> <p>13 the word "advantage." It also -- excuse me. I'm</p> <p>14 sorry. In frequently asked question number 18, it</p> <p>15 even suggests that you could have the station on the</p> <p>16 individual, Mr. Smith's, own website.</p> <p>17 Q The fact of the matter is on this website</p> <p>18 what Live is saying to potential broadcaster is if you</p> <p>19 sign up with us to be a broadcaster, there's a</p> <p>20 potential advantage to you of being part of our</p> <p>21 webcasting network, right?</p> <p>22 A There's a potential advantage, yes.</p>

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1195	<p>1 Q Okay. Now, actually, if you look at</p> <p>2 frequently asked question number 10, which asks, "How</p> <p>3 can I generate revenue from my broadcast," in the last</p> <p>4 bullet point, Live talks about how broadcasters can</p> <p>5 obtain a share of subscription revenue from the</p> <p>6 webcasting network, right?</p> <p>7 A Are you talking about the bounty bullet?</p> <p>8 Q Actually the bullet point above that.</p> <p>9 A Oh, I'm sorry. Talks about getting some</p> <p>10 subscribers to tune into Mr. Smith's webcasts.</p> <p>11 Q Right. So my hypothetical Mr. Smith can earn</p> <p>12 some money if he's a broadcaster with Live by getting</p> <p>13 some of their subscription revenue from their</p> <p>14 webcasting, right?</p> <p>15 A Yes, it says that it attracts VIP members.</p> <p>16 Q And VIP members, by the way, are subscribers;</p> <p>17 is that right?</p> <p>18 A Yes.</p> <p>19 Q And my hypothetical Mr. Smith also has the</p> <p>20 ability to get a bounty if someone signs up for a</p> <p>21 subscription through him?</p> <p>22 A Yes.</p>	1197	<p>1 that they can reach millions of Live365 listeners,</p> <p>2 right?</p> <p>3 A That's what it says, yes.</p> <p>4 Q And that's because, if they buy the broadcast</p> <p>5 package, they're going to be part of Live365's</p> <p>6 webcasting business, right?</p> <p>7 A They'll be on the list of available webcasts.</p> <p>8 Q And Live holds that out as an advantage to</p> <p>9 these people in signing up, right?</p> <p>10 A That's one of their selling points, yes.</p> <p>11 CHIEF JUDGE SLEDGE: You may have answered</p> <p>12 the next to last question, but it wasn't clear to me.</p> <p>13 The customers of Live365 who elect the personal</p> <p>14 broadcasting package are part of the Internet radio</p> <p>15 revenues portion of Live365?</p> <p>16 THE WITNESS: Only if they are -- Live365 is</p> <p>17 collecting -- is paying the -- collecting the</p> <p>18 royalties for that -- part of the royalty-bearing ATH.</p> <p>19 CHIEF JUDGE SLEDGE: And if they are, then</p> <p>20 they are part of the Internet radio revenues?</p> <p>21 THE WITNESS: Right. In my calculations,</p> <p>22 yes.</p>
1196	<p>1 Q Now, you'll see that, on the first page of</p> <p>2 this document, it refers to professional broadcasting</p> <p>3 services. Do you see that?</p> <p>4 A Yes.</p> <p>5 Q Now, Live also has something that it calls a</p> <p>6 personal broadcasting package, correct?</p> <p>7 A Yes.</p> <p>8 Q Let me show you what we've previously marked</p> <p>9 as SoundExchange Trial Exhibit 15. I believe this</p> <p>10 document is not in evidence yet.</p> <p>11 Have you seen this document before?</p> <p>12 A I actually have not seen this document in</p> <p>13 particular.</p> <p>14 Q Do you understand this to be another screen</p> <p>15 shot from Live365's website?</p> <p>16 A Yes.</p> <p>17 Q And so in this document -- this is a document</p> <p>18 aimed at people who might want to buy the personal</p> <p>19 broadcasting package, right?</p> <p>20 A That's what the title says, yes.</p> <p>21 Q And right up near the top, people who might</p> <p>22 want to buy the personal broadcasting package are told</p>	1198	<p>1 MR. HANDZO: So -- actually, before I do at</p> <p>2 that, Your Honor, I would move SoundExchange Trial</p> <p>3 Exhibit 15 into evidence.</p> <p>4 CHIEF JUDGE SLEDGE: Any objection to</p> <p>5 Exhibit 15?</p> <p>6 MR. MacDONALD: Yes, Your Honor. There's</p> <p>7 been no authentication. The witness has testified</p> <p>8 he's never seen this document before.</p> <p>9 CHIEF JUDGE SLEDGE: Any response?</p> <p>10 MR. HANDZO: Your Honor, he also indicated</p> <p>11 that it does appear to him to be a screen shot of the</p> <p>12 Live365 website, and I believe he indicated in prior</p> <p>13 testimony that he has been on that website before.</p> <p>14 CHIEF JUDGE SLEDGE: Mr. MacDonald, I'm going</p> <p>15 to apply a standard on this offer that this is a piece</p> <p>16 of evidence that will assist the judges in making</p> <p>17 their determination because, at this point, from the</p> <p>18 evidence I've heard, there is great confusion over how</p> <p>19 to categorize Live365's customers, and this exhibit</p> <p>20 will help analyze that and, therefore, it's admitted.</p> <p>21 (SoundExchange Trial Exhibit Number 15 was</p> <p>22 received into evidence.)</p>

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<p>1 MR. MacDONALD: Your Honor, may I get 2 clarification? 3 CHIEF JUDGE SLEDGE: May you get 4 clarification? I'll hear what you have to say. 5 MR. MacDONALD: Is this Exhibit 15 coming in 6 for that limited purpose that Your Honor just stated? 7 CHIEF JUDGE SLEDGE: It's admitted into 8 evidence. I don't know if there's anything such thing 9 as limited purpose. I've heard that talked about in 10 case law, it's never seemed to make much sense. 11 Either something is evidence or it's not. 12 MR. MacDONALD: Thank you, Your Honor. 13 BY MR. HANDZO: 14 Q Isn't it fair to say, Dr. Fratrik, that part 15 of the value Live365 gets from having its webcasting 16 service is that it is something that Live can promote 17 when it's trying to get people to sign up as 18 broadcasters? 19 A It is one of the things that they know in 20 trying to promote that broadcaster services line of 21 business. 22 Q And so there is a value to Live in having its</p>	<p>1 Q All right. So my hypothetical Ms. Jones is 2 going to be part of what you call the webcasting 3 business, right? 4 A Correct. 5 Q Okay. So to the extent that there are ad 6 revenues or subscription revenues associated with 7 Ms. Jones' channel, they show up on your table 1, 8 right? 9 A Yes. 10 Q Okay. But Mr. Smith, who's just like 11 Ms. Jones except that he pays the royalties himself, 12 nothing from his channel shows up on your table 1, 13 correct? 14 A Because no advertising revenues are sold on 15 his webcasts. 16 Q But for both Ms. Smith and Ms. Jones -- 17 JUDGE WISNIEWSKI: Are you certain of that, 18 Dr. Fratrik? 19 THE WITNESS: Yes. 20 JUDGE WISNIEWSKI: Okay. 21 BY MR. HANDZO: 22 Q Well, let's go back to that. If I am a</p>
1200	1202
<p>1 webcasting business because it helps them sell their 2 broadcasting business, right? 3 A Among many other things that is involved in 4 helping them sell their broadcasting business. 5 Q Okay. But having the webcasting business is 6 one of those things, right? 7 A It's one of several things, I'm sure. 8 Q Now, even -- 9 CHIEF JUDGE SLEDGE: Again, the labels are 10 very loosely used by Live365 witnesses. When you say 11 webcasting business, are you referring to Internet 12 radio services portion of Live365? 13 THE WITNESS: Yes, I am. 14 BY MR. HANDZO: 15 Q Let me -- hopefully -- maybe I can help a 16 little bit to clarify. I'm going ask you about 17 another hypothetical broadcaster, and we'll call her 18 Ms. Jones. Ms. Jones wants to be a broadcaster with 19 Live, but -- and so she signs up for a broadcasting 20 package, but she decides that Live is going to pay the 21 sound recording royalties for her. Okay? 22 A That's correct. Yes. That's an opportunity.</p>	<p>1 subscriber to Live365, I'm one of their VIP customers, 2 I'm going to get access to all of the channels, right? 3 A Correct. 4 Q So to the extent that Live is selling 5 subscriptions, it's making money not only from the 6 channels that you characterized as being part of the 7 webcasting business, but also from the channels that 8 you characterize as being part of the broadcasting 9 business, right? 10 A That only subscribe to the broadcasting 11 services business? 12 Q No. If I am a subscriber to Live365 -- I pay 13 Live's VIP fee, right -- I will get access to all of 14 the channels, right? 15 A Yes. 16 Q And I will get access to the channels that 17 you say are part of the webcasting business, correct? 18 A Yes. 19 Q But I will also get access to the channels 20 that you say are part of the broadcast business and 21 that you exclude from this analysis? 22 A The ones that are not royalty-bearing, yes.</p>

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1203	<p>1 Q Okay. So Live, when it sells a subscription, 2 is earning revenue both on what you call the 3 broadcaster channels and on what you call the 4 webcasting channels, correct? 5 A Yes, but in my calculations, I divide by the 6 total -- the average number of total hours that the 7 subscriber listens, so I'm looking on a per ATH basis, 8 the subscription revenues that Live365 -- so say they 9 listen to 30 hours of subscription-based -- excuse me, 10 30 hours of royalty-bearing ATH and ten hours of 11 non-royalty-bearing. By dividing it by the 40 number, 12 I take care of the fact that I'm only allocating the 13 royalties, the subscription revenues appropriately. 14 Q I think -- I was going back to the court's 15 question. I thought you said earlier that Live is not 16 earnings revenue on what you call the broadcast 17 channels? 18 A I think -- the judge actually referred to 19 advertising revenue, not subscription revenues. 20 Q Okay. So you would agree that Live does earn 21 subscription revenue on those channels? 22 A Some of the hours that the subscriber listens</p>
1204	<p>1 to may be non-royalty-bearing ATH. 2 Q Meaning they're not included in your table 1? 3 A Those royalty-bearing -- non-royalty-bearing 4 hours are not included in table 1. 5 JUDGE WISNIEWSKI: Dr. Fratrik, if I could 6 pursue the question that I asked a little bit further. 7 How is it that you know that no advertising is carried 8 on the non-Internet radio stations who buy other 9 services from Live365? 10 THE WITNESS: I was told by personnel at 11 Live365 that the advertising is only sold on the U.S. 12 royalty-bearing ATHs. 13 JUDGE WISNIEWSKI: Thank you. 14 BY MR. HANDZO: 15 Q Now, let me go back to my hypothetical 16 Ms. Jones who buys a broadcast package from Live and 17 is going to have Live pay the sound recording 18 royalties. Okay? Now, that person, Ms. Jones, is 19 going to pay a monthly fee to Live for the broadcast 20 services, right? 21 A For those services, yes. 22 Q And none of that revenue shows up on table 1,</p>
1205	<p>1 right? 2 A Right. Because that's not part of their 3 Internet radio service. In your hypothetical, 4 Ms. Jones could have bought it from another provider 5 of broadcaster services. 6 Q Now, in the case of my Ms. Jones, the 7 bandwidth costs associated with her channel shows up 8 on your table 1, right? 9 A Yes, it is. 10 Q And the royalties for sound recordings that 11 would be attributable to Ms. Jones' channel show up on 12 your table 1, right? Well, actually, I'm sorry. Let 13 me -- wrong question. The royalties for, let's say, 14 the PROs -- 15 A Yes, they are. 16 Q -- would show up here for Ms. Jones' channel, 17 right? 18 A As well as for Thompson. 19 Q If there are -- 20 JUDGE ROBERTS: Mr. Handzo, you said your 21 Ms. Jones bought -- if we look at SoundExchange Trial 22 Exhibit 14 and we look to the second to last page</p>
1206	<p>1 where there's the professional broadcasting pricing, 2 Ms. Jones is buying one of these packages that are in 3 the chart here that says "royalty licensing included"? 4 MR. HANDZO: Yes. 5 JUDGE ROBERTS: And Dr. Fratrik, you're 6 saying that the revenues generated by this Ms. Jones 7 paying -- let's take, for instance, the monthly fee up 8 to 96K; the intro is 136.50. You're saying that that 9 is excluded from the revenue calculation of your 10 table? That would not go into the revenue portion? 11 I thought I heard you say originally that, 12 yes -- originally, yes, since Live365 is paying the 13 royalty fee, then this would go into the -- be 14 considered Internet broadcasting, webcasting, and the 15 136.50 would go into the revenue base of your table, 16 table 1 here. But I thought I heard you say, in 17 response to the most recent questions from Mr. Handzo, 18 that, no, this is broadcasting activity, so this 19 revenue for Ms. Jones is excluded from table 1. So my 20 question to you is, which is it? 21 THE WITNESS: These revenues are excluded 22 because these are part of the broadcaster services.</p>

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<p>1207</p> <p>1 JUDGE ROBERTS: Even though Ms. Jones is 2 buying the package where it says "royalty licensing 3 included," 136.50? 4 THE WITNESS: I believe that Ms. Jones is -- 5 the revenue from selling her the broadcaster services 6 are excluded, but the aggregate tuning hours I think 7 are part of the royalty-bearing in that situation. 8 JUDGE ROBERTS: So of this money that 9 Ms. Jones pays in here, 136.50 a month, are you saying 10 that you're allocating some portion of that for 11 purposes of your revenue chart on table 1? 12 THE WITNESS: No. 13 CHIEF JUDGE SLEDGE: It sounded to me like 14 you said that you were allocating the cost, but not 15 the revenue. 16 THE WITNESS: These fees are similar to what 17 an independent broadcaster services company would be 18 charging, such as Liquid Compass or Akamai. The costs 19 of the aggregate tuning hours that the hypothetical 20 Ms. Jones has, that would be part of the 21 royalty-bearing because Live365 would be responsible 22 for that.</p>	<p>1209</p> <p>1 advertising revenues. 2 JUDGE ROBERTS: Okay. So in Mr. Handzo's 3 hypothetical questions or hypothetical scenarios here 4 of Mr. Smith and Ms. Jones, in both instances, both 5 for Mr. Smith and Ms. Jones, the amount of fees they 6 pay per month -- and in my example here it's 136.50 a 7 month -- those fees are not included on your table 1? 8 THE WITNESS: No, those are broadcaster 9 services fees. 10 JUDGE ROBERTS: So they are -- 11 THE WITNESS: They are not included. 12 JUDGE ROBERTS: But the costs associated with 13 providing bandwidth to Ms. Jones and to Mr. Smith for 14 their station, those costs are indeed in table 1? 15 THE WITNESS: Yes, because they could lead to 16 advertising revenues as well as a share of the 17 subscriber revenues. 18 JUDGE ROBERTS: All right. Now I think I 19 finally understand what's going on. 20 JUDGE WISNIEWSKI: Let me just follow up with 21 one quick question on that. We were told in earlier 22 testimony that, in fact, the advertising revenues are</p>
<p>1208</p> <p>1 JUDGE ROBERTS: So you would include the 2 costs associated with operating Ms. Jones' station on 3 your table 1, but you wouldn't include any of the 4 revenues that Ms. Jones is paying in table 1? 5 THE WITNESS: I wouldn't include any of the 6 revenues that Ms. Jones is paying for her broadcaster 7 services. I would include any of the revenues that 8 Ms. Jones' website is realizing from the advertising 9 that is sold on her webcasts. 10 JUDGE ROBERTS: And if she doesn't have any 11 advertising or is unable to sell it, then there's no 12 revenues being included for Ms. Jones even though 13 she's paying 136.50? 14 THE WITNESS: It isn't her selling it. It's 15 Live365 selling it. 16 JUDGE ROBERTS: Fair enough. 17 THE WITNESS: So if Live365 was unable, 18 because of a particular type of format that Ms. Jones 19 is providing, that they cannot sell advertising, then 20 there probably wouldn't be any advertising revenues 21 associated with that particular webcast. There are 22 other webcasts that I'm told that generate substantial</p>	<p>1210</p> <p>1 shared with the webcasters and they're shared in the 2 form of a credit, credit on the fees that they are 3 charged. Where does that show up in this allocation? 4 THE WITNESS: The credits that they get 5 are -- I believe they -- I believe those advertising 6 revenues, they would be included in the advertising 7 revenues that I calculate at \$1.97 million up on the 8 top where those advertising revenues are -- 9 JUDGE WISNIEWSKI: But those are Live365 10 advertising revenues. 11 THE WITNESS: Right. Because they are -- 12 JUDGE WISNIEWSKI: I'm talking about the 13 portion that is credited to the actual webcaster. 14 THE WITNESS: I don't think they're included 15 in my calculation. 16 BY MR. HANDZO: 17 Q Dr. Fratrik, when my Ms. Jones signs up for 18 the royalty-included package and pays an introductory 19 fee of 136.50, you would expect that that price was 20 set in part to cover the cost of the sound recording 21 royalties, right? 22 A Yes.</p>

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1211	<p>1 Q So Live is charging Ms. Jones an amount to</p> <p>2 cover the sound recording royalties, but you're not</p> <p>3 taking into account Ms. Jones' payment to Live to</p> <p>4 cover the sound recording royalties when you calculate</p> <p>5 what Live could pay, right?</p> <p>6 A Well, those royalties licensing included --</p> <p>7 that line also includes payments to ASCAP, BMI and</p> <p>8 SESAC, as well as to SoundExchange, too.</p> <p>9 Q Okay. So Ms. Jones is paying to cover the</p> <p>10 sound recording royalty and the PRO royalties, right?</p> <p>11 A Correct.</p> <p>12 Q And you're showing the PRO royalties as an</p> <p>13 expense to Live, right?</p> <p>14 A Correct.</p> <p>15 Q But you're not showing the payment from</p> <p>16 Ms. Jones to Live to cover that royalty, right?</p> <p>17 A That's part of the broadcast services --</p> <p>18 broadcaster services line of business.</p> <p>19 Q And you're treating sound recording royalties</p> <p>20 the same way, correct?</p> <p>21 A Yes.</p> <p>22 Q Now, let me just ask you to look a little</p>
1212	<p>1 further down on your table 1 on page 19. You'll see</p> <p>2 on the line that says, "IT operations and customer</p> <p>3 service" --</p> <p>4 A Yes.</p> <p>5 Q -- you've attributed a hundred percent of</p> <p>6 Live365's costs for IT operations and customer service</p> <p>7 to what you call the webcasting business, right?</p> <p>8 A That's correct.</p> <p>9 Q And so you have attributed zero percent of IT</p> <p>10 operations and customer service to what you call the</p> <p>11 broadcasting business, right?</p> <p>12 A That is correct.</p> <p>13 Q You understand, don't you, that Live does</p> <p>14 provide customer service to its -- what you've called</p> <p>15 its broadcaster customers, right?</p> <p>16 A Right. But I'm not sure that those customer</p> <p>17 services to the broadcaster are part of that category.</p> <p>18 Q Well, you say this is a hundred percent of</p> <p>19 Live's IT operations and customer service, right?</p> <p>20 A Yes.</p> <p>21 Q All right. So you have taken off Live's</p> <p>22 financials 100 percent of its cost for IT operations</p>
1213	<p>1 and customer service and attributed them to the</p> <p>2 webcaster business, right?</p> <p>3 A For that line item, I attribute a hundred</p> <p>4 percent of that.</p> <p>5 Q Okay. So when you analyze the costs</p> <p>6 associated with what you call the webcaster business,</p> <p>7 you're putting all of the costs for customer service</p> <p>8 and IT on the webcasting business and none of it on</p> <p>9 the broadcasting business, right?</p> <p>10 A I'm putting that entire line item of IT</p> <p>11 operation and customer service on the webcasting</p> <p>12 business.</p> <p>13 Q Even though the people who are -- you would</p> <p>14 say are broadcasters get IT support and they get</p> <p>15 customer service, right?</p> <p>16 A I think that the customer service -- the</p> <p>17 broadcasters may be in another category.</p> <p>18 Q Well, I thought you just told us -- and your</p> <p>19 document says -- that this is a hundred percent of</p> <p>20 those costs?</p> <p>21 A It's a hundred percent of that line item.</p> <p>22 Q Well, by that logic, everything should be</p>
1214	<p>1 hundred percent of that line item. I mean, I'm --</p> <p>2 when you say a hundred percent, doesn't that mean a</p> <p>3 hundred percent of Live365's costs?</p> <p>4 A Yes. Live365's line item IT operations and</p> <p>5 customer services --</p> <p>6 Q Okay.</p> <p>7 A -- should -- that line item, a hundred</p> <p>8 percent, should be allocated to -- I allocate a</p> <p>9 hundred percent of that to the webcasting service.</p> <p>10 Q Right. And so that necessarily means that</p> <p>11 you think the broadcasting side of the business has no</p> <p>12 such expenses, right?</p> <p>13 A Not in that line item. Could be in another</p> <p>14 line item under customer services.</p> <p>15 Q Let me ask you to look at Exhibit 10 to your</p> <p>16 written testimony. Dr. Fratrik, looking at Exhibit 10</p> <p>17 to your written testimony, this is an operating income</p> <p>18 statement for all of Live365's business, right?</p> <p>19 A That's correct.</p> <p>20 Q Including the broadcast services business,</p> <p>21 right?</p> <p>22 A Correct.</p>

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<p style="text-align: right;">1215</p> <p>1 Q And you see a line item there for IT and CS, 2 right? 3 A Correct. 4 Q And CS stands for customer service? 5 A That's exactly right. 6 Q Okay. And the corresponding number to that 7 line item for fiscal year 2008 is 391,688, right? 8 A Correct. 9 Q And that is precisely the number that shows 10 up for IT operations and customer service in your 11 table 1, correct? 12 A Correct. 13 Q So you are allocating 100 percent of all of 14 Live365's IT operations and customer service for all 15 of its lines of business to the webcasting business, 16 right? 17 A What I'm saying is that of -- that IT and CS, 18 that line item, a hundred percent of that. There may 19 be customer service activities in other categories for 20 broadcast services. 21 Q Well, they don't show up on your Exhibit 10, 22 do they?</p>	<p style="text-align: right;">1217</p> <p>1 Q Do you know what's in that category? 2 A It's detailed a little more on Exhibit 10, 3 collocated facility, ad services, et cetera. 4 Q Credit card expenses? 5 A Credit card expenses, that's what CC -- thank 6 you for reminding me. 7 Q So here again you've allocated 100 percent of 8 all of Live's expenses for those categories to the 9 webcasting business, correct? 10 A Yes. 11 Q And you would expect certainly that Live 12 would have credit card expenses for its broadcast 13 business, right? 14 A It may. People may pay by check. 15 Q My Mr. Smith may pay by credit card, too, 16 right? 17 A So may Mrs. Jones. 18 Q So you're going to have credit card expenses 19 for both the people you call webcasters and the people 20 you call broadcasters, right? 21 A There maybe some in both. 22 Q Okay. But you've allocated all of that</p>
<p style="text-align: right;">1216</p> <p>1 A No, because I'm -- well, they're not 2 specified in Exhibit 10. 3 Q Well, there is a line on Exhibit 10 for IT 4 and customer service, right? 5 A That's correct. 6 Q And you put every penny of that in 7 webcasting, right? 8 A Yes, I did. 9 Q All right. And you would agree with me, 10 wouldn't you, that Live does, in fact, provide 11 customer service to the broadcasters, right? 12 A They do provide some -- I'm sure there are 13 some questions. 14 Q And they do provide IT support to the 15 broadcast services business, right? 16 A Could be support. I'm not sure if it's 17 operations. 18 Q Now, let's go down one more line to the 19 "other" category on table 1. Do you see that you've 20 allocated here a hundred percent of that category as 21 well? 22 A Yes, I have.</p>	<p style="text-align: right;">1218</p> <p>1 expense to the webcasting business? 2 A Right, because that category includes much 3 more than just credit card expenses. 4 Q Let me ask you to turn back again to your 5 table 5. 6 MR. HANDZO: I'm sorry, Your Honor. That is 7 page 28. 8 BY MR. HANDZO: 9 Q Are you with me, Dr. Fratrik? 10 A Yes, I am. 11 Q Once again, this is the table on which you 12 base your recommended rate, correct? 13 A Correct. 14 Q And this includes costs that you derived from 15 your table 1, right? 16 A Correct. 17 Q But unlike your table 2, which uses Live 18 advertising revenues, here you've used advertising 19 revenues from the ZenithOptimedia report, right? 20 A As well as information from Live365 21 subscription revenues. 22 Q Okay. All right. So let me be clear. The</p>

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<p style="text-align: right;">1219</p> <p>1 information you got from the ZenithOptimedia report 2 relates to advertising revenues, correct? 3 A That is correct. 4 Q Now, you actually had two reports for 5 industry-wide advertising revenues for webcasters, 6 correct? 7 A That's correct. 8 Q One was ZenithOptimedia and one was 9 Accustream? 10 A I believe they're pronounced ZenithOptimedia, 11 but -- Accustream, yes, those two. 12 Q And the Accustream data showed an 13 industry-wide ad revenue figure for 2008 of 14 84 million; is that right? 15 A Correct. 16 Q And the ZenithOptimedia report for the same 17 time period showed industry-wide ad revenues of 18 200 million? 19 A That's correct. 20 Q So one report had revenues almost 21 two-and-a-half times the amount of the other report? 22 A Two-and-a-quarter, yes.</p>	<p style="text-align: right;">1221</p> <p>1 needed to use a number from the Accustream report, 2 right? 3 A Yes. 4 Q And that was the total ATH for the webcasting 5 industry? 6 A That was their estimate, yes. 7 Q So, in fact, to come up with your ad revenue 8 per ATH, you had to take numbers from these two 9 different reports? 10 A Correct. 11 Q And you were comfortable doing that despite 12 the fact that these two reports had such different 13 outcomes? 14 A Yes. 15 Q And then, having derived your number for 16 advertising revenue per ATH, in this table, you use 17 the Live costs per ATH, right? 18 A Repeat that question. 19 Q Sure. In this table, for the ad revenue 20 you're using the number you derived for ad revenue per 21 ATH from the ZenithOptimedia and the Accustream 22 report, right?</p>
<p style="text-align: right;">1220</p> <p>1 Q Didn't that disparity in these two reports 2 give you some concern? 3 A No. The webcasting industry is a very young 4 industry that had multiple number of webcasters out 5 there, unlike radio and television where there's been 6 a long history of reporting revenues, a good sense of 7 what those revenues are. It doesn't surprise me that 8 there is that wide range just because of the type of 9 industry that we're talking about here. 10 Q Meaning it's -- just for this industry it's 11 really difficult and complicated to come up with these 12 estimates, correct? 13 A I would have to use the adjective 14 "challenging." 15 Q Challenging, difficult, all of that, right? 16 A Yes. 17 Q And in part it's difficult and challenging 18 because webcasters, for the most part, don't report 19 these revenues publicly, correct? 20 A And the vast number of them. 21 Q All right. So now in this table 5 you're 22 using the ZenithOptimedia ad revenue, but you also</p>	<p style="text-align: right;">1222</p> <p>1 A The ATH number from Accustream. 2 Q Okay. And then the cost component came from 3 Live365 data, not industry-wide data? 4 A Correct. 5 JUDGE WISNIEWSKI: Well, we're missing an 6 element here, aren't we, because didn't you say that, 7 in fact, the subscription revenue for ATH is the 8 Live365 number? 9 THE WITNESS: That's exactly correct, Your 10 Honor. 11 JUDGE WISNIEWSKI: So that was added to the 12 revenue -- the ad revenue per ATH as calculated in the 13 way you described from two other sources? 14 THE WITNESS: Yes. 15 JUDGE WISNIEWSKI: Okay. Thank you. 16 BY MR. HANDZO: 17 Q Now, in making your decision to use the 18 Live365 data for the cost per ATH, I take it you're 19 assuming that Live is typical of other webcasters? 20 A Yes. I think I mentioned that explicitly in 21 my direct testimony, that I considered Live365, with a 22 ten-year experience of being a webcaster, as being a</p>

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1223	<p>1 typical webcaster -- representative of a typical 2 webcaster. 3 Q Now, you would agree with me, wouldn't you, 4 Dr. Fratrik, that there are different types of 5 webcasters out there with various different services 6 and different business models? 7 A I'd say offered various services, yes. 8 Q And various different business models? 9 A I'm not sure exactly what you mean by 10 business models. 11 Q Well, Dr. Fratrik, do you still have your 12 deposition there? 13 A Right nearby. 14 Q Why don't you turn to page 45. Down at the 15 bottom do you see the last answer: "Because there are 16 different types of webcasters out there with various 17 different services and different business models"? 18 Do you see that? 19 A Yes. 20 Q So that was actually your phrase, right? 21 A Yes. I think it was in context of when we 22 were talking about the revenue sources, and that's</p>	1225	<p>1 Network, iMeem, Lala. I think there was one or two 2 others. 3 Q And did you update your analysis here to show 4 that those costs are typical? 5 A No, because they weren't -- they were either 6 incomplete or not equivalent. 7 Q Okay. So you weren't able to use that data 8 to confirm your opinion that Live is typical, correct? 9 A Unfortunately, not. 10 Q Now, as we mentioned a minute ago, you also 11 used Live's subscription revenues as being typical of 12 the rest of the webcasting industry, correct? 13 A Yes, I did. 14 Q And your calculation of that appears on 15 page 24 of your testimony? 16 A Yes. 17 Q Now, in making that calculation, you used an 18 average -- you said the average subscriber listened to 19 approximately 40 hours per month? 20 A That's correct. 21 Q I'm just curious why you used an average 22 number when, in your table 1, you have actually the</p>
1224	<p>1 what I wanted to clarify in your question. 2 Q Okay. But as a general matter, you do agree 3 that there are various webcasters out there offering 4 different services with different business models? 5 A Yes. 6 Q And you're holding up Live as typical of them 7 with respect to costs, correct? 8 A As a typical commercial webcaster, yes. 9 Q Now, you have not verified that Live's costs 10 are typical of other webcasters, have you? 11 A No, I have not. 12 Q You don't have any data to support that 13 opinion, do you? 14 A At the time of my writing of the testimony, 15 Live365 was the only cost data for which I saw. 16 Q Okay. And that remains the case today, 17 correct? 18 A I have -- during the discovery process I've 19 seen some cost data from other webcasters as well as 20 incomplete data reflecting some of the costs. 21 Q What webcasters did you see data from? 22 A I believe I saw some cost data from Real</p>	1226	<p>1 total royalty-bearing ATH number there. 2 A Oh, because I'm looking at the subscriber 3 usage. I'm trying to generate a subscriber revenue 4 per ATH as opposed to -- so I only have to look at the 5 average hours that -- the hours that an average 6 subscriber utilizes per month. 7 Q Okay. So to make this calculation, you're 8 actually using different data than the data you used 9 in table 1, correct? 10 A Of course it's different because I'm just 11 looking at the subset of subscribers to Live365 to 12 find out what their revenue per ATH is. It would be 13 incorrect to use Live -- non-subscribers and a 14 subscribers in calculating subscriber revenue per ATH. 15 Q Now, looking back at table 5, this table, if 16 I understand it correctly, treats Live's costs as 17 typical, treats Live's subscription revenues as 18 typical, but does not accept Live's ad revenues as 19 typical, right? 20 A I'm using an independent source for the total 21 industry advertising revenues. 22 Q So you're saying Live is not typical for ad</p>

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1227	<p>1 revenues?</p> <p>2 A I'm using another source so as to see what</p> <p>3 the number would be.</p> <p>4 Q Well, if you're saying that Live is typical</p> <p>5 with respect to costs and typical with respect to</p> <p>6 subscription revenue, why isn't Live typical with</p> <p>7 respect to ad revenues?</p> <p>8 A There could be a number of reasons insofar as</p> <p>9 their ability to generate advertising revenues,</p> <p>10 et cetera.</p> <p>11 JUDGE ROBERTS: Could be or is?</p> <p>12 THE WITNESS: Well, utilizing the industry</p> <p>13 revenue of \$200 million, I see that they do</p> <p>14 generate -- accepting that as the industry revenue</p> <p>15 estimate, it leads to a higher advertising revenue per</p> <p>16 ATH than what Live365 would generate. So the answer</p> <p>17 to your question is it is using that industry</p> <p>18 estimate.</p> <p>19 BY MR. HANDZO:</p> <p>20 Q The bottom line, Dr. Fratrik, is you chose</p> <p>21 not to use Live's ad revenues as typical, even though</p> <p>22 you used Live's costs and subscription revenues as</p>	1229	<p>1 Q Yes.</p> <p>2 A I think they're representative of commercial</p> <p>3 webcasters overall and I think that, to err on the</p> <p>4 conservative side, I applied a higher revenue per ATH,</p> <p>5 advertising revenue per ATH.</p> <p>6 Q Now, that number that you got from</p> <p>7 ZenithOptimedia for total industry advertising, would</p> <p>8 that include advertising from broadcaster simulcaster</p> <p>9 stations?</p> <p>10 A The total industry number, yes.</p> <p>11 Q But you actually regard broadcaster</p> <p>12 simulcasters as not being -- fitting within your</p> <p>13 model, correct?</p> <p>14 A I don't model broadcaster simulcasters who</p> <p>15 are webcasting.</p> <p>16 Q And you do not suggest that your results in</p> <p>17 your model would apply to broadcast simulcasters,</p> <p>18 correct?</p> <p>19 A Correct.</p> <p>20 Q But you're including their advertising</p> <p>21 numbers in the ZenithOptimedia data that you used for</p> <p>22 this model, right?</p>
1228	<p>1 typical; is that right?</p> <p>2 A I did not utilize Live's advertising revenues</p> <p>3 in my model that led to my proposed royalty rate.</p> <p>4 Q Because you regard them as atypical?</p> <p>5 A I wanted to err on the conservative side</p> <p>6 also.</p> <p>7 Q Let me ask the question this way: Do you</p> <p>8 think that Live's ad revenues are typical of the</p> <p>9 webcasting industry?</p> <p>10 A I think there are some webcasters that may</p> <p>11 generate higher advertising revenue per ATH, and</p> <p>12 utilizing that industry number suggests that there are</p> <p>13 many that do.</p> <p>14 Q So is the answer to my question, no, you</p> <p>15 think Live is not typical with respect to ad revenues?</p> <p>16 A I'd say they may be on the lower side of that</p> <p>17 number.</p> <p>18 Q Let me ask it -- I'll try one more time. Is</p> <p>19 there any reason why Live would be typical with</p> <p>20 respect to costs, typical with respect to</p> <p>21 subscription, but atypical with respect to ad revenue?</p> <p>22 A Typical, typical, atypical?</p>	1230	<p>1 A Yes.</p> <p>2 Q Now, in your model, you include on the</p> <p>3 revenue side only ad revenue and subscription revenue,</p> <p>4 right?</p> <p>5 A Correct.</p> <p>6 Q Now, there are companies that make money</p> <p>7 other ways, aren't there?</p> <p>8 A In webcasting?</p> <p>9 Q Sure.</p> <p>10 A There are some that make money in downloads</p> <p>11 and several other ways.</p> <p>12 Q Well, for example, there are portals like AOL</p> <p>13 and Yahoo! which use their webcasting service to bring</p> <p>14 people in and then they go to other parts of the site,</p> <p>15 right?</p> <p>16 A That's one of their reasons, yes.</p> <p>17 Q And that's one of the ways that they make</p> <p>18 money, right?</p> <p>19 A Yes.</p> <p>20 Q But you don't include any of that in your</p> <p>21 model, do you?</p> <p>22 A No. I'm just -- I'm modeling a webcaster who</p>

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1231	<p>1 has only two sources of revenue, subscription 2 revenue -- subscription revenues and advertising 3 revenues. 4 MR. HANDZO: Your Honor, we've been going 5 over a little hour and a half, and whatever pop I got 6 from the lunch break, I've now lost, so -- if I ever 7 had it. So if this were a convenient time to take a 8 break -- I obviously will keep going if the court 9 wants me to. 10 CHIEF JUDGE SLEDGE: We'll recess ten 11 minutes. 12 MR. HANDZO: Thank you. 13 (Whereupon, a short recess was taken.) 14 CHIEF JUDGE SLEDGE: We'll come to order. 15 Mr. Handzo. 16 BY MR. HANDZO: 17 Q Dr. Fratrik, before we broke, I think you 18 mentioned that there are different kind of webcasters 19 who have different kinds of business models, right? 20 A That is correct. 21 Q And I want to make sure I understand who you 22 think your model applies to. You would agree with me</p>	1233	<p>1 A The assumption I made is that the commercial 2 webcaster that I'm modeling has subscription and 3 advertising revenues. 4 Q Well, further, didn't you also assume that 5 those commercial webcasters have subscription and 6 advertising revenues in the same proportion that Live 7 does? 8 A Yes, and that would reinforce what data that 9 I obtained from SoundExchange during the discovery 10 portion of the trial. 11 Q Well, to be clear, your model makes actually 12 two assumptions with respect to subscription, doesn't 13 it? Sorry, that was a little Delphic question. Let 14 me see if I can make it clearer. We'll take it one at 15 a time. 16 A I know what Delphic means. 17 Q Your model assumes that webcasters receive 18 the same revenue per ATH for their subscription 19 services that Live does, right? 20 A The model I have -- I'm utilizing Live's 21 subscriber revenues and their ATH, and they're very 22 similar to other data that I saw.</p>
1232	<p>1 that there are -- if we're talking about different 2 business models, one might be terrestrial broadcasters 3 who also simulcast? 4 A Correct. 5 Q And there are also webcasters who offer a 6 degree of customization or interactivity that's still 7 statutory but more than just plain vanilla webcasting? 8 A Correct. 9 Q And there are portals like Yahoo! and AOL, 10 right? 11 A Yes. 12 Q And there are some webcasters who focus more 13 on subscription and some who focus more on 14 ad-supported, right? 15 A Yes. 16 Q Now, in terms of the analysis that you've 17 done in your written testimony, I take it it is your 18 opinion that that would not apply to terrestrial 19 broadcasters who simulcast? 20 A Correct. 21 Q Is it your view, though, that your results 22 are applicable to all other statutory services?</p>	1234	<p>1 Q Okay. 2 CHIEF JUDGE SLEDGE: I'm sorry. Please say 3 that again. 4 THE WITNESS: I'm utilizing Live's 5 subscription revenues and their average number of 6 hours, 40 hours that their subscribers listen to, to 7 derive the subscriber revenue per ATH. And those 40 8 hours is very similar to other data that I saw for 9 other subscribers -- for other services that have 10 subscribers. 11 CHIEF JUDGE SLEDGE: Do you imply by that 12 answer that your model is designed for webcasters that 13 have that same ratio? 14 THE WITNESS: Yes. 15 CHIEF JUDGE SLEDGE: I think that was the 16 question to you. 17 THE WITNESS: Yes. 18 CHIEF JUDGE SLEDGE: All right. 19 BY MR. HANDZO: 20 Q And not all webcasters do have that same 21 ratio, do they? 22 A No. Some webcasters have lower subscriber</p>

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1235	1237
<p>1 revenues, subscriber prices. Some may have greater</p> <p>2 ATH for subscribers. Some may have lower.</p> <p>3 Q And some may have a higher percentage of</p> <p>4 hours devoted to subscription than Live does, right?</p> <p>5 A Right. But as I mentioned earlier, through</p> <p>6 some industry numbers provided during discovery, the</p> <p>7 industry numbers suggest that they were very close to</p> <p>8 the percentages that I utilize in my analysis.</p> <p>9 Q And I take it your opinion is that your</p> <p>10 results would apply both to a webcaster who does a</p> <p>11 very high percentage of its business through</p> <p>12 subscription and also to a webcaster who does a very</p> <p>13 high percentage of their business through ad support?</p> <p>14 A Right. There's a wide range of differences,</p> <p>15 and I was describing the typical webcaster vis-a-vis</p> <p>16 what you're talking about, the subscriber versus</p> <p>17 advertising revenue breakout.</p> <p>18 CHIEF JUDGE SLEDGE: Well, that confused me.</p> <p>19 I hear that as being directly opposite of what you</p> <p>20 just said a moment ago, that your model is designed</p> <p>21 for commercial webcasters who have the same ratio of</p> <p>22 revenues that Live365 has.</p>	<p>1 Live365 as 76.5 percent of the hours going to</p> <p>2 non-subscribers and 23.5 percent going to subscribers</p> <p>3 was nearly identical to what the industry total number</p> <p>4 was.</p> <p>5 CHIEF JUDGE SLEDGE: What I'm hearing to</p> <p>6 conflict with that that's troubling me is that you</p> <p>7 just said that this model is applicable to a</p> <p>8 commercial webcaster who has predominant subscription</p> <p>9 ATH and minimum advertising ATH.</p> <p>10 THE WITNESS: I didn't mean to say that, Your</p> <p>11 Honor. I'm utilizing Live365 distribution to describe</p> <p>12 that typical webcaster, so that typical webcaster</p> <p>13 would have the identical distribution.</p> <p>14 CHIEF JUDGE SLEDGE: Well, I heard you right</p> <p>15 the first time.</p> <p>16 THE WITNESS: Okay. I'm sorry.</p> <p>17 CHIEF JUDGE SLEDGE: Neither one of us spoke</p> <p>18 or heard wrong [sic] the second time.</p> <p>19 BY MR. HANDZO:</p> <p>20 Q I really hesitate to go here, but I want to</p> <p>21 make sure I'm clear. So what you're saying is your</p> <p>22 model applies to webcasters who have basically the</p>
1236	1238
<p>1 THE WITNESS: Right. I used approximately</p> <p>2 the same ratio, and I --</p> <p>3 CHIEF JUDGE SLEDGE: Well, then, how can it</p> <p>4 be designed to be applicable to a webcaster who has</p> <p>5 the exact opposite of ratios that Live365 has?</p> <p>6 THE WITNESS: What I'm saying, Your Honor, is</p> <p>7 that there will be some on one side and some on the</p> <p>8 other side. And the distribution of subscription</p> <p>9 revenues, the importance of subscription revenues, the</p> <p>10 importance of subscribers versus advertising -- that</p> <p>11 the data that I showed on an industry basis -- that I</p> <p>12 saw on an industry basis were very similar to the</p> <p>13 percentage that I use in my model.</p> <p>14 CHIEF JUDGE SLEDGE: So it's not designed for</p> <p>15 a commercial webcaster who has the same ratios as</p> <p>16 Live365?</p> <p>17 THE WITNESS: I'm sorry I'm confusing you,</p> <p>18 sir, but I'm utilizing that ratio in describing the</p> <p>19 typical webcaster. So it is the same -- it would have</p> <p>20 the same distribution. My point about citing the</p> <p>21 other industry data is that, from what I saw of other</p> <p>22 industry data, that distribution in the case of</p>	<p>1 same distribution of subscription and ad that Live</p> <p>2 does?</p> <p>3 A Yes.</p> <p>4 Q Okay. Now, with respect to the services that</p> <p>5 offer a more customized webcasting service but are</p> <p>6 still subscription -- I'm sorry, that are still</p> <p>7 statutory, I take it it's your opinion that your model</p> <p>8 applies to them as well?</p> <p>9 A Yes.</p> <p>10 Q But those kinds of services might have a</p> <p>11 different cost structure than Live does, right?</p> <p>12 A Right. They could be higher or lower.</p> <p>13 Q You don't know?</p> <p>14 A No.</p> <p>15 Q And those kinds of services might have a</p> <p>16 greater ability to make money on their webcast</p> <p>17 streams, right?</p> <p>18 A Or a lesser ability, too.</p> <p>19 Q Right. You don't know?</p> <p>20 A Right.</p> <p>21 Q And it's your opinion, is it not, that your</p> <p>22 model is also applicable to portals like AOL and</p>

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<p style="text-align: right;">1239</p> <p>1 Yahoo!?</p> <p>2 A As they are commercial webcasters, yes.</p> <p>3 Q You don't know whether the cost structure of</p> <p>4 a portal like Yahoo! is the same as the cost structure</p> <p>5 of Live, do you?</p> <p>6 A Relating to its webcasting business?</p> <p>7 Q Yes.</p> <p>8 A I suspect it is the same, but I don't know.</p> <p>9 Q And to the extent that portals like AOL and</p> <p>10 Yahoo! use music to draw people in and then have them</p> <p>11 visit other parts of the portal, you can't put a value</p> <p>12 on that, right?</p> <p>13 A No, I don't. I only have two sources of</p> <p>14 revenue, subscription and advertising revenue.</p> <p>15 Q So the value of music to portals like AOL and</p> <p>16 Yahoo! may be different than the value of music to a</p> <p>17 webcaster like Live365, right?</p> <p>18 A It may be different, yes.</p> <p>19 Q Actually, since we've just been talking about</p> <p>20 ad and subscription, let me go back to the part of</p> <p>21 your testimony that I think starts on page 11 where</p> <p>22 you talk about the recent history of the webcasting</p>	<p style="text-align: right;">1241</p> <p>1 been entry into the market that has increased the</p> <p>2 inventory available, right?</p> <p>3 A As well as other inventory that increased in</p> <p>4 other sites.</p> <p>5 Q My question is just on webcasting. You would</p> <p>6 agree with me, wouldn't you, that there has been</p> <p>7 market entry there that has increased the inventory?</p> <p>8 Isn't that true?</p> <p>9 A There's been some increase in the number of</p> <p>10 webcasters, yes.</p> <p>11 Q And that increase in inventory from</p> <p>12 webcasters entering the market might have the effect</p> <p>13 of depressing CPMs, right?</p> <p>14 A Any competition generally leads to lower</p> <p>15 prices.</p> <p>16 Q In fact, one of the people you talked to in</p> <p>17 preparing your testimony was Mr. Lam, right?</p> <p>18 A I did talk to him, yes.</p> <p>19 Q And, in fact, Mr. Lam complained to you that</p> <p>20 one of the problems Live has is that new webcasters</p> <p>21 have entered the market and become very successful at</p> <p>22 attracting a lot of listeners.</p>
<p style="text-align: right;">1240</p> <p>1 business.</p> <p>2 A Yes.</p> <p>3 Q And I take it the theme of that section is</p> <p>4 that the advertising market and CPMs have not grown as</p> <p>5 anticipated?</p> <p>6 A In fact, they went negative.</p> <p>7 Q Now, with respect to Live, ad revenue is</p> <p>8 actually only 20 percent of Live's overall business,</p> <p>9 correct?</p> <p>10 A If you include all of the broadcast services</p> <p>11 revenues in your total, yes.</p> <p>12 Q Now, part of what you were saying in this</p> <p>13 section of your testimony starting at page 11 is that</p> <p>14 CPMs have not increased and may have gone down,</p> <p>15 correct?</p> <p>16 A Yes.</p> <p>17 Q Now, part of the reason for that, though, is</p> <p>18 that more webcasters have entered the market since</p> <p>19 2007; isn't that true?</p> <p>20 A There have been some entry as well as other</p> <p>21 entry of other online and other advertising venues.</p> <p>22 Q But with respect to webcasting, there has</p>	<p style="text-align: right;">1242</p> <p>1 A Are you reading from something?</p> <p>2 Q Didn't Mr. Lam tell you that?</p> <p>3 A I believe he said something to that effect,</p> <p>4 yes.</p> <p>5 Q Well, let's refresh your recollection. Why</p> <p>6 don't you look at page 31 of your deposition.</p> <p>7 A Thank you.</p> <p>8 Q Do you see -- are you with me on that page?</p> <p>9 A Yes, I am.</p> <p>10 Q And does that refresh your recollection about</p> <p>11 what Mr. Lam told you?</p> <p>12 A Right. Yes, it does.</p> <p>13 Q And he told you that one of the problems Live</p> <p>14 has is that new webcasters are entering the market,</p> <p>15 right?</p> <p>16 A As I mention in my deposition -- I didn't</p> <p>17 quote him verbatim, but webcasters have been very</p> <p>18 successful in attracting a lot of listeners,</p> <p>19 increasing the competition on Live365's ability to</p> <p>20 generate advertising revenues.</p> <p>21 Q So that new market entry has created</p> <p>22 competition for Live, right?</p>

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1243	<p>1 A As any new market entry would, yes.</p> <p>2 Q You would agree, wouldn't you, that actually</p> <p>3 if you look at the webcasting market, the number of</p> <p>4 overall performances has been increasing?</p> <p>5 A I saw data that the total industry listeners</p> <p>6 and performances have been increasing.</p> <p>7 Q Now, on the -- related to that point, at</p> <p>8 least, on page 15, you have a figure 3 --</p> <p>9 A Yes, I have.</p> <p>10 Q -- do you see that?</p> <p>11 And that's from a JPMorgan report?</p> <p>12 A It's included in one of my exhibits, yes.</p> <p>13 Q And that JPMorgan report also addressed</p> <p>14 simulcast broadcasters, right?</p> <p>15 A Yes, it did.</p> <p>16 Q This chart that you've shown is only what you</p> <p>17 refer to as pure play webcasters?</p> <p>18 A Correct.</p> <p>19 Q And the JPMorgan report showed that, for</p> <p>20 simulcast broadcasters, actually the numbers are up,</p> <p>21 right?</p> <p>22 A Yes. For simulcast broadcasters, yes.</p>	1245
1244	<p>1 Q Okay. But you didn't show us that in your</p> <p>2 written testimony, did you?</p> <p>3 A No. I was describing a pure play Internet</p> <p>4 radio broadcaster.</p> <p>5 Q Now, let's just flip forward to pages 29 and</p> <p>6 30 of your written testimony.</p> <p>7 A Yes.</p> <p>8 Q And there you're talking about some new data</p> <p>9 that you got from SoundExchange?</p> <p>10 A That's correct.</p> <p>11 Q And if you flip over to page 30, you say that</p> <p>12 analysis of that data results in results that are</p> <p>13 close to the Accustream numbers?</p> <p>14 A The advertising revenue numbers, yes.</p> <p>15 Q Those are the Accustream numbers that appear</p> <p>16 in your table 4?</p> <p>17 A They don't actually appear in table 4, but</p> <p>18 they're used in calculating the -- some of the</p> <p>19 variables in table 4.</p> <p>20 Q So what you're saying in page 30 is that the</p> <p>21 data you got, in your view, confirms the Accustream</p> <p>22 data that you used in table 4?</p>	1246

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1247	<p>1 A Correct.</p> <p>2 Q And for 2008, it's got 200?</p> <p>3 A Yes.</p> <p>4 Q That's the 200 million that you relied on?</p> <p>5 A That's correct.</p> <p>6 Q And this shows it going up to 291 million in</p> <p>7 2011?</p> <p>8 A Yes, that's correct. That's what it says.</p> <p>9 But that would come with possibly increased number of</p> <p>10 ATH.</p> <p>11 Q So if I understood your last answer, what</p> <p>12 you're saying is that even if the advertising revenues</p> <p>13 grow, you think the costs will grow with it?</p> <p>14 A No, I didn't say that in the last answer.</p> <p>15 Q All right. Well, your rate proposal is based</p> <p>16 on the ZenithOptimedia numbers, right?</p> <p>17 A For 2008, yes.</p> <p>18 Q And those numbers that you rely on show a</p> <p>19 significant increase in advertising revenue over the</p> <p>20 next two or three years, right?</p> <p>21 A Total industry advertising revenue, yes.</p> <p>22 Q Total webcasting industry, right?</p>	1249	<p>1 people other than the broadcasters -- webcasters other</p> <p>2 than broadcasters, wouldn't that hurt the sellers</p> <p>3 unless there was some effective ability to price</p> <p>4 discriminate?</p> <p>5 A If you charge different rates and you cannot</p> <p>6 price discriminate, in a sense, you would have</p> <p>7 problems and that wouldn't work for the seller.</p> <p>8 Q Okay. And in order to be able to</p> <p>9 successfully price discriminate -- I'm sorry. In</p> <p>10 order to be able to successfully price discriminate,</p> <p>11 isn't it true that the sellers would need to be able</p> <p>12 to segment out customers, effectively?</p> <p>13 A Right, and prevent arbitrage.</p> <p>14 Q And isn't it true that webcasters like Live</p> <p>15 and broadcaster simulcasters actually compete for</p> <p>16 customers and listeners?</p> <p>17 A They certainly do, yes.</p> <p>18 Q And given that what we'll call pure play</p> <p>19 webcasters and broadcaster simulcasters compete for</p> <p>20 listeners, that would make it difficult to segment out</p> <p>21 customers, wouldn't it?</p> <p>22 A Not at all.</p>
1248	<p>1 A Webcasting, thank you.</p> <p>2 CHIEF JUDGE SLEDGE: I'm sorry. What?</p> <p>3 THE WITNESS: Total webcasting industry</p> <p>4 advertising revenues, yes, what they refer to as</p> <p>5 Internet radio.</p> <p>6 BY MR. HANDZO:</p> <p>7 Q Dr. Fratrik, you told me earlier that you</p> <p>8 actually don't think the modeling that you did here</p> <p>9 would be applicable to set a rate for terrestrial</p> <p>10 broadcasters who simulcast; am I recalling that</p> <p>11 correctly?</p> <p>12 A That's correct.</p> <p>13 Q Does that mean that you think this court</p> <p>14 should actually set two different rates?</p> <p>15 A I don't believe that the court is -- what do</p> <p>16 you mean by two different rates?</p> <p>17 Q One for broadcasters who simulcast and one</p> <p>18 for everybody else.</p> <p>19 A I believe broadcasters who simulcast already</p> <p>20 have an agreement with SoundExchange, so the court</p> <p>21 isn't being asked to set a rate for them.</p> <p>22 Q If the court were to set a different rate for</p>	1250	<p>1 Q Well, isn't it the case, in order to price</p> <p>2 discriminate, that you have to be able to segment out</p> <p>3 the ultimate customers, the listeners?</p> <p>4 A No.</p> <p>5 Q Well, if you can't do that, then aren't the</p> <p>6 listeners going to migrate to the lower cost service?</p> <p>7 A The listeners aren't paying for -- directly</p> <p>8 paying for their listening in many cases.</p> <p>9 Q And in many cases they are?</p> <p>10 A Well, not many cases. There's many more</p> <p>11 non-subscriber hours than subscriber hours.</p> <p>12 Q But if you give a lower rate to someone in</p> <p>13 the market, you're going to give them a competitive</p> <p>14 advantage, aren't you?</p> <p>15 A It all depends upon their entire cost</p> <p>16 structure and their revenue ability.</p> <p>17 Q Well, is it your testimony, then, that</p> <p>18 sellers in a marketplace will lower their price for</p> <p>19 buyers who are less efficient and have higher costs?</p> <p>20 A Sellers lower their prices for a class of</p> <p>21 customers depending upon the -- what economists refer</p> <p>22 to as demand elasticity, the ability of those</p>

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1251	1253
<p>1 customers, the benefit that those customers get from 2 utilizing that product or service. 3 Q Are you aware of any other market where the 4 seller cuts its price because its buyer is not very 5 efficient? 6 A I'm not aware of whether or not the buyer is 7 efficient. I'm aware that the -- the seller charges 8 different prices to different classes of customers 9 based upon the perceived value of those customers 10 which are different. And if they're able to segment 11 it, then it's a profit-maximizing move by the seller 12 to charge different prices. 13 Q Well, you told me earlier that pure play 14 webcasters and broadcasters compete for listeners, 15 right? 16 A They do, yes. 17 Q And to the extent that -- if you set a lower 18 rate for pure play webcasters and they are taking 19 business away from broadcasters, that's going to hurt 20 the sellers, right? 21 A Not necessarily. 22 Q Aren't the sellers going to be getting --</p>	<p>1 A Yes, I do. 2 Q And that begins on page 33; is that right? 3 A Yes. 4 Q And one of the things that you say leads you 5 to think that there is some promotional value to 6 webcasting is some agreements you saw between Live and 7 certain indie labels, right? 8 A Yes. 9 Q The only agreements you've seen are the three 10 or four that are attached to Mr. Floater's testimony, 11 right? 12 A I believe those are the ones that I saw, yes. 13 Q You haven't seen any others? 14 A Not that I recall, no. 15 Q And the most recent of those is 2005, right? 16 A I believe so, but I believe they continue on 17 with the airing of those independent label artists to 18 the present. 19 Q Well, you haven't seen any agreement that's 20 dated later than 2005, have you? 21 A That's dated later than 2005, but continue on 22 into the present term.</p>
1252	1254
<p>1 those customers are going to services that pay lower 2 royalties, right? 3 A Are you suggesting a one-for-one transfer 4 from -- or -- I mean, if commercial webcasters, 5 statutory commercial webcasters, increase their number 6 of listeners by more than what they -- than the 7 simulcasters -- broadcast simulcasters lose, then the 8 copyright owners may actually generate greater 9 revenues. 10 Q When you acknowledge that commercial 11 webcasters and broadcasters compete for customers, 12 what you mean is that commercial webcasters may be 13 able to take some customers or listeners away from 14 broadcasters, right? 15 A Right. For competition -- 16 Q And to the extent that that happens, if the 17 broadcasters are paying a higher royalty rate, that 18 hurts the seller, doesn't it? 19 A Depending upon whether or not the end result 20 is the greater number of listeners overall. 21 Q Dr. Fratrik, in your written testimony I 22 believe you talk about promotion at some point?</p>	<p>1 Q So as far as you know, no one has agreed to 2 enter into such an agreement since 2005, right? 3 A Not that I'm aware of. I haven't seen any 4 contracts. 5 Q Okay. And no major label has ever -- has 6 agreed to enter into such an agreement with Live, 7 right? 8 A No, they were all independent. 9 Q You also, in support of your opinion about 10 promotion, talked about survey evidence that people 11 hear new artists through webcasting? 12 A Yes. 13 Q But you can't say how many sales result from 14 that, can you? 15 A No, but I'm struck by that number -- that 16 percentage is actually -- increases even more. In the 17 most recent study by Arbitron they just released 18 recently -- once again, called the Infinite Dial 19 2010 -- they actually split out the percentage of 20 people 12 to 34 who indicate that listening to 21 webcasts is -- one of the main reasons is to find out 22 a lot about new artists.</p>

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1255	<p>1 And from my understanding of some RIAA data,</p> <p>2 customer survey data, those age groups of</p> <p>3 approximately 12 to 34 are a very large percentage of</p> <p>4 the people who purchase either MP3 or CDs. So going</p> <p>5 from that fact, that a higher percentage of that</p> <p>6 demographic group looked towards the Internet</p> <p>7 webcasting for learning new artists and they tend to</p> <p>8 be a very large portion of new purchases, that leads</p> <p>9 me to believe that that does lead to some new sales.</p> <p>10 Q Well, you can't say whether those people who</p> <p>11 are finding new artists are going out and buying or</p> <p>12 whether the fact that they're listening to webcasting</p> <p>13 and finding new artists means that they don't have any</p> <p>14 need to go out and buy. You don't know which it is,</p> <p>15 do you?</p> <p>16 A Right. But to learn new artists and if they</p> <p>17 enjoy those new artists, given the performance rules</p> <p>18 that they would -- it would seem that the only way</p> <p>19 that they could be guaranteed to hear those new</p> <p>20 artists on a consistent basis is by purchasing an MP3</p> <p>21 file or a CD.</p> <p>22 Q Live actually has 6,000 channels, right?</p>	1257	<p>1 Q And that's between 2004 and when?</p> <p>2 A The date of my testimony.</p> <p>3 Q Which is February '09? I'm sorry --</p> <p>4 A Oh, it's February -- yeah, February '09.</p> <p>5 Actually, it was, I believe, September -- yeah,</p> <p>6 September of '09. We're in 2010.</p> <p>7 Q Okay. So we're talking about maybe 300,000 a</p> <p>8 year?</p> <p>9 A That's quick division, yes.</p> <p>10 Q Do you know what the total sales of CDs and</p> <p>11 downloads have been during that time?</p> <p>12 A The total sales? I think it's in the 11,</p> <p>13 \$12 billion range.</p> <p>14 Q Billion?</p> <p>15 A Billion, yeah, with a B.</p> <p>16 Q So we're talking about a tiny drop in the</p> <p>17 bucket here, aren't we?</p> <p>18 A It's additional sales that go to the</p> <p>19 recording industry.</p> <p>20 Q Well, you say additional sales. Actually,</p> <p>21 you don't know that anybody who bought through a</p> <p>22 click-through channel wouldn't have bought otherwise?</p>
1256	<p>1 A Approximately that, yes.</p> <p>2 Q So if you want to listen to Live365, you can</p> <p>3 find a very narrow slice of music to listen to, can't</p> <p>4 you?</p> <p>5 A You can find specific genres, but you can't</p> <p>6 be guaranteed listening to a particular artist at any</p> <p>7 one point in time.</p> <p>8 Q But with 6,000 channels to choose from, you</p> <p>9 can find very narrow slices of genres, can't you?</p> <p>10 A Right, but the -- yes, they are very narrow</p> <p>11 slices.</p> <p>12 Q And that might satisfy your desire to listen</p> <p>13 to music without having to go out and buy it, right?</p> <p>14 A It might satisfy it, but if you want to</p> <p>15 listen to a particular artist, you may want to</p> <p>16 purchase.</p> <p>17 Q Now, the other thing you pointed to, I</p> <p>18 believe, in your testimony is the click-through sales?</p> <p>19 A Yes.</p> <p>20 Q And I think you said there's about</p> <p>21 \$1.3 million of such sales for Live?</p> <p>22 A That's exactly right.</p>	1258	<p>1 A No, I don't know that.</p> <p>2 Q So you don't know if it's an additional sale</p> <p>3 or not, do you?</p> <p>4 A No, but the clicks did lead to the actual</p> <p>5 sale.</p> <p>6 Q Well, the buyer might have bought through</p> <p>7 some other method. It may not be that the</p> <p>8 click-through was causing it, right?</p> <p>9 A I believe the click-through was at the same</p> <p>10 time that the song was being played, or shortly</p> <p>11 thereafter. So it may have led the customer to say,</p> <p>12 oh, I like that artist, I want purchase it.</p> <p>13 Q But you can't say, Dr. Fratrik, how many</p> <p>14 sales would have resulted anyway, even without the</p> <p>15 click-through?</p> <p>16 A Correct.</p> <p>17 Q All right. Now, in your testimony,</p> <p>18 Dr. Fratrik, you suggest that the court should, in</p> <p>19 addition to adopting your rate proposal, should have a</p> <p>20 20 percent aggregator discount?</p> <p>21 A Yes.</p> <p>22 Q And I take it part of the basis for that</p>

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1259	<p>1 opinion is that you think there are benefits provided</p> <p>2 to SoundExchange from this aggregation?</p> <p>3 A Benefits to SoundExchange as well as to the</p> <p>4 PROs.</p> <p>5 CHIEF JUDGE SLEDGE: I'm sorry, how would a</p> <p>6 discount paid to the -- royalties paid to</p> <p>7 SoundExchange affect the PROs?</p> <p>8 THE WITNESS: It's the same benefit in terms</p> <p>9 of the recordkeeping in terms of making it easier for</p> <p>10 the collector -- in this case, SoundExchange; in the</p> <p>11 other cases, the three PROs -- in terms of these small</p> <p>12 webcasters and collectively -- and making the</p> <p>13 administrative benefits.</p> <p>14 CHIEF JUDGE SLEDGE: So your proposed</p> <p>15 discount has no benefit to the PROs?</p> <p>16 THE WITNESS: No. The PROs recognize the</p> <p>17 benefit of that aggregation. I'm sorry, did I confuse</p> <p>18 you again?</p> <p>19 CHIEF JUDGE SLEDGE: No. I'm repeating what</p> <p>20 you said. You got confused.</p> <p>21 THE WITNESS: Oh, I apologize.</p> <p>22 BY MR. HANDZO:</p>	1261
1260	<p>1 Q In formulating your opinion about the -- what</p> <p>2 you believe to be the benefits of an aggregation</p> <p>3 service, did you consider whether Live365 submits</p> <p>4 information to SoundExchange in a form that complies</p> <p>5 with this court's regulations?</p> <p>6 A Submits information what, I'm sorry?</p> <p>7 Q Submits information to SoundExchange in a</p> <p>8 form that complies with the court's regulations.</p> <p>9 A I believe that it aggregates the information</p> <p>10 and supplies it to SoundExchange. I'm not sure</p> <p>11 exactly in what form it does.</p> <p>12 Q And you would agree with me, wouldn't you,</p> <p>13 that if Live365 submits it in a form that is not what</p> <p>14 this court requires, that's not actually really a</p> <p>15 benefit to SoundExchange, is it?</p> <p>16 A That particular part of the aggregation</p> <p>17 benefits are not, but I have a whole other area of</p> <p>18 aggregation benefits.</p> <p>19 Q Well, let's talk for a second about the other</p> <p>20 thing you point to, which is, I think, some agreements</p> <p>21 with the PROs. And in particular you discuss an</p> <p>22 agreement with BMI, I believe?</p>	1262
	<p>1 A Yes.</p> <p>2 Q Or two agreements with BMI, right?</p> <p>3 A Right. I compare the agreement that Live365</p> <p>4 had with BMI and compare that to their general BMI</p> <p>5 agreement that's on their website.</p> <p>6 Q The general BMI agreement is called the BMI</p> <p>7 website music performance agreement?</p> <p>8 A Yes.</p> <p>9 Q Do you know which services are eligible for</p> <p>10 the rates in that agreements?</p> <p>11 A Commercial webcasters at a certain level of</p> <p>12 listening level -- of listening hours. I don't know</p> <p>13 what that level is off the top of my head.</p> <p>14 Q And the second agreement that you discuss is</p> <p>15 called the 2006 Live365 minicaster website music</p> <p>16 performance agreement, right?</p> <p>17 A Correct.</p> <p>18 Q There's nothing in that agreement that refers</p> <p>19 to an aggregator discount, is there?</p> <p>20 A No, but it's with -- the agreement is with</p> <p>21 BMI and Live365 who operates as an aggregator.</p> <p>22 Q Well, actually, what's happening in that</p>	

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1263	<p>1 Q Do you know, by the way, how many minicasters</p> <p>2 have opted into that agreement?</p> <p>3 A No.</p> <p>4 Q So you don't know to what extent those lower</p> <p>5 rates for the minicaster agreement actually are in</p> <p>6 effect?</p> <p>7 A No. Since I don't know the number, I don't</p> <p>8 know the extent of it.</p> <p>9 Q Okay. For all you know, there may be nobody</p> <p>10 who's using those rates, right?</p> <p>11 A I talked with the individual at Live365 --</p> <p>12 Mr. Chang, I believe his name is -- and he gave me the</p> <p>13 impression that there were some. So, I mean, he was</p> <p>14 involved in making sure that those -- dealing with the</p> <p>15 administrative aspects of it. And I believe he has a</p> <p>16 full-time job, so I'm implicitly assuming that there</p> <p>17 were some.</p> <p>18 Q Okay. So there are 6,000 channels on</p> <p>19 Live365, right?</p> <p>20 A Approximately, yes.</p> <p>21 Q So all you can say is there are some who are</p> <p>22 using this minicaster agreement?</p>
1264	<p>1 A Correct.</p> <p>2 Q And it's that minicaster agreement that you</p> <p>3 rely on in support of your testimony that there should</p> <p>4 be a 20 percent discount, right?</p> <p>5 A In part. I utilize the data from the other</p> <p>6 two PROs also.</p> <p>7 Q And those agreements are essentially similar,</p> <p>8 are they not?</p> <p>9 A Insofar as providing a discount for</p> <p>10 webcasters through Live365.</p> <p>11 Q For minicasters?</p> <p>12 A I'm not sure exactly what the definition is</p> <p>13 there.</p> <p>14 Q You don't know?</p> <p>15 A No.</p> <p>16 Q At the end of your testimony, Dr. Fratrik,</p> <p>17 you --</p> <p>18 JUDGE WISNIEWSKI: Are you moving on to a</p> <p>19 different subject?</p> <p>20 MR. HANDZO: I am, Your Honor, yes.</p> <p>21 JUDGE WISNIEWSKI: Dr. Fratrik, with respect</p> <p>22 to this definition of aggregation, you have given us a</p>
1265	<p>1 model using Live365 as a typical webcaster, and the</p> <p>2 Internet radio service that is provided under Live365,</p> <p>3 it's Live365 that's the licensee; is that not correct?</p> <p>4 THE WITNESS: Live365 is the licensee of</p> <p>5 what?</p> <p>6 JUDGE WISNIEWSKI: For the statutory license.</p> <p>7 THE WITNESS: Yes.</p> <p>8 JUDGE WISNIEWSKI: So how is what Live365</p> <p>9 does by offering 6,000, 7,000 channels different from</p> <p>10 what any other webcaster may do with respect to</p> <p>11 offering 20 channels, hundred channels, a thousand</p> <p>12 channels operating under a single license?</p> <p>13 THE WITNESS: Are you asking me would an</p> <p>14 aggregator benefit be applicable to a webcaster that</p> <p>15 had a hundred channels?</p> <p>16 JUDGE WISNIEWSKI: Yes. I'm asking you</p> <p>17 precisely that question.</p> <p>18 THE WITNESS: Yes. The definition that we</p> <p>19 suggest is that, after you -- if you have multiple</p> <p>20 number of channels -- I believe the threshold is a</p> <p>21 hundred -- that they should also enjoy the benefits of</p> <p>22 the aggregator discount.</p>
1266	<p>1 JUDGE WISNIEWSKI: And so what's the</p> <p>2 difference between that and an Internet radio -- well,</p> <p>3 a terrestrial radio company that simulcasts 500</p> <p>4 different channels? Why shouldn't they get this same</p> <p>5 discount that you're proposing?</p> <p>6 THE WITNESS: I'm not suggesting that they</p> <p>7 shouldn't.</p> <p>8 JUDGE WISNIEWSKI: You're saying that they</p> <p>9 should be able --</p> <p>10 THE WITNESS: If they --</p> <p>11 JUDGE WISNIEWSKI: -- under the same</p> <p>12 rationale.</p> <p>13 THE WITNESS: Under the same rationale and</p> <p>14 also insofar as -- yes. I wouldn't exclude anybody</p> <p>15 who had over a hundred.</p> <p>16 JUDGE WISNIEWSKI: Do you know if there are</p> <p>17 such differential rates negotiated among broadcasters?</p> <p>18 THE WITNESS: With SoundExchange or with the</p> <p>19 PROs?</p> <p>20 JUDGE WISNIEWSKI: With SoundExchange. Let's</p> <p>21 start there.</p> <p>22 THE WITNESS: No, I don't believe there are.</p>

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<p style="text-align: right;">1267</p> <p>1 JUDGE WISNIEWSKI: How about with the PROs? 2 THE WITNESS: I don't know of whether or not 3 there's a separate -- if they have separate 4 agreements, like Live365, with various discounts like 5 Live365. 6 JUDGE WISNIEWSKI: Thank you, sir. 7 JUDGE ROBERTS: Dr. Fratrik, your description 8 of it as an aggregator discount, it's not aggregator 9 discount; it's a number of channel discount, correct? 10 THE WITNESS: They're aggregating separate 11 individual webcasters, yes, a number of -- 12 JUDGE ROBERTS: That's not what I'm asking 13 you. Judge Wisniewski asked you about those services 14 that offer a lot of channels, more than a hundred 15 channels, and in response to his questions you said 16 yes, those people should get a discount, too. But 17 they're not aggregating anything. They're just 18 providing a lot of channels, different kinds of 19 channels of music. 20 THE WITNESS: Well, they're aggregating in 21 the sense of providing consolidated information for 22 compliance with the SoundExchange forms and so on.</p>	<p style="text-align: right;">1269</p> <p>1 them. 2 THE WITNESS: Right. And if they compiled 3 all that information into one form as accurately as 4 required so that SoundExchange would have -- save some 5 administrative benefits from having to look at the 6 100, 200, 300 simulcasters separately, that they could 7 look at that collectively, then there would be some 8 benefits that -- 9 JUDGE ROBERTS: How would they do it any 10 other way? They're the company that owns all these 11 terrestrial broadcasters. They're the owner. They're 12 going to be the one that's reporting. 13 It's not that -- it's not that there's over a 14 hundred different broadcast stations that are owned by 15 different people. They're the one broadcaster that 16 owns over -- these 100 stations. So they're not 17 putting together other people's webcasts. It's their 18 webcasts. They are the licensee. They are the 19 webcaster. But they are offering all these different 20 channels. 21 But you keep telling me that that's 22 aggregating, and I don't understand how that's</p>
<p style="text-align: right;">1268</p> <p>1 And I want to point out also that my aggregator 2 discount also relates to the economic benefit that an 3 aggregator can provide to the webcaster and thus help 4 sustain them more financially. 5 JUDGE ROBERTS: Well, you're distinguishing, 6 though, now between a service like Live365 and one 7 that Judge Wisniewski put forward to you of a 8 simulcaster. If a terrestrial broadcaster that owns 9 more than a hundred stations and puts those stations 10 on the web and offers them, you are saying that, yes, 11 they should get an aggregator discount, too. But 12 they're not aggregating. They own all those 13 terrestrial broadcast stations, and they're simply 14 offering them to people across the United States. So, 15 really, they have -- are offering over a hundred 16 channels worth of programming because they have over a 17 hundred broadcast stations -- 18 THE WITNESS: And if they -- 19 JUDGE ROBERTS: -- which they all own. 20 THE WITNESS: I'm sorry. I didn't mean to 21 interrupt. 22 JUDGE ROBERTS: Of which they own all of</p>	<p style="text-align: right;">1270</p> <p>1 aggregating. 2 THE WITNESS: The point I was trying to make, 3 Your Honor, was that if they compiled their 4 information collectively as opposed to sending a 5 hundred separate reports, if they combine it 6 collectively they're aggregating all the information 7 of the hundred separate simulcast stations, that that 8 would lead to a benefit to SoundExchange because of 9 their administrative cost savings, that they would 10 just have to look at or deal with just one 11 consolidated form. 12 JUDGE ROBERTS: So the benefit occurs once 13 you get over a hundred channels? 14 THE WITNESS: That's the threshold that I'm 15 using, yes. 16 JUDGE ROBERTS: And why did you decide upon a 17 hundred channels? 18 THE WITNESS: It was just a number that sort 19 of indicates that that's when it becomes substantial 20 benefits. 21 JUDGE ROBERTS: But you don't -- you didn't 22 do any analysis as to what the costs were for less</p>

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<p>1 than a hundred channels versus costs associated --</p> <p>2 SoundExchange's costs versus over a hundred channels?</p> <p>3 THE WITNESS: No, I did not.</p> <p>4 JUDGE WISNIEWSKI: Just one further question,</p> <p>5 Dr. Fratrik. You make this recommendation at the end</p> <p>6 of your analysis, but -- and Live365 adopts the</p> <p>7 recommendation in their rate proposal.</p> <p>8 THE WITNESS: Correct.</p> <p>9 JUDGE WISNIEWSKI: In addition to that,</p> <p>10 however, they adopt a cap on the minimum fee. Isn't</p> <p>11 that a reflection of this benefit that you're talking</p> <p>12 about as well?</p> <p>13 THE WITNESS: I think the minimum fee has to</p> <p>14 deal with more of just -- of the financial ability of</p> <p>15 small webcasters, where the aggregator benefit has to</p> <p>16 deal with more of both the administrative savings that</p> <p>17 I just discussed --</p> <p>18 JUDGE WISNIEWSKI: We're not talking about</p> <p>19 the financial ability of a small webcaster. We're</p> <p>20 talking about the financial ability of Live365, aren't</p> <p>21 we? That's this whole analysis.</p> <p>22 THE WITNESS: The financial ability of the</p>	<p>1 performances?</p> <p>2 THE WITNESS: No, I don't.</p> <p>3 CHIEF JUDGE SLEDGE: Just something you</p> <p>4 decided?</p> <p>5 THE WITNESS: If the minimum fee isn't</p> <p>6 capped, then small webcasters may not find it</p> <p>7 financially viable to webcast.</p> <p>8 CHIEF JUDGE SLEDGE: You phrased a different</p> <p>9 question. That's not what I'm asking.</p> <p>10 THE WITNESS: I'm sorry.</p> <p>11 CHIEF JUDGE SLEDGE: Do you have any data to</p> <p>12 support your statement that if small webcasters do not</p> <p>13 pay a minimum fee, they will increase their</p> <p>14 performances?</p> <p>15 THE WITNESS: If they do not pay their</p> <p>16 minimum fee, it will increase their performance -- no,</p> <p>17 I don't have any data.</p> <p>18 CHIEF JUDGE SLEDGE: All right. Mr. Handzo.</p> <p>19 MR. HANDZO: Thank you, Your Honor.</p> <p>20 BY MR. HANDZO:</p> <p>21 Q Actually, one last subject matter, I think,</p> <p>22 fairly quickly. You have testified at various times</p>
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<p>1 small webcaster leads to greater performances and,</p> <p>2 thus, greater royalty payments to SoundExchange.</p> <p>3 JUDGE WISNIEWSKI: Yes.</p> <p>4 THE WITNESS: So that benefit of having</p> <p>5 greater performances because these small webcasters</p> <p>6 can sustain themselves through the advertising revenue</p> <p>7 benefits brought on by the aggregator allows</p> <p>8 SoundExchange -- the copyright owners to gather more</p> <p>9 royalty payments.</p> <p>10 JUDGE WISNIEWSKI: I'm not quite sure I</p> <p>11 follow that. I guess what I'm trying to get at here:</p> <p>12 Aren't there essentially two bites at the same apple</p> <p>13 here, two discounts being asked for in relation to</p> <p>14 what you describe as an administrative cost benefit, a</p> <p>15 transactions cost benefit?</p> <p>16 THE WITNESS: I believe the minimum fee</p> <p>17 doesn't have anything to do with the aggregator aspect</p> <p>18 of Live365 or any other aggregator.</p> <p>19 JUDGE WISNIEWSKI: Okay. Thank you.</p> <p>20 CHIEF JUDGE SLEDGE: Do you have any data to</p> <p>21 support your opinion that if small webcasters don't</p> <p>22 pay a minimum fee, they will increase their</p>	<p>1 throughout the day that you believe that there are</p> <p>2 different economics for broadcaster simulcasters</p> <p>3 versus other commercial webcasters, right?</p> <p>4 A Yes.</p> <p>5 Q And one of the things I think you said this</p> <p>6 morning was that the broadcasters' performing --</p> <p>7 sorry -- programming costs are essentially paid for by</p> <p>8 their terrestrial radio operations, correct?</p> <p>9 A That there's no additional programming costs</p> <p>10 for the commercial broadcaster to start simulcasting.</p> <p>11 Q Okay. Now, for Live365, it actually doesn't</p> <p>12 have any programming cost either, does it?</p> <p>13 A No, it does not.</p> <p>14 Q In fact, for Live365, people pay Live365 to</p> <p>15 be the programmer?</p> <p>16 A They pay for broadcast services.</p> <p>17 Q Okay. So my Ms. Jones does her own</p> <p>18 programming and then, on top of that, she provides it</p> <p>19 to Live and she pays them some money, right?</p> <p>20 A For the broadcast services, she pays them</p> <p>21 money.</p> <p>22 Q Okay. And broadcasters, when they simulcast,</p>

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<p style="text-align: right;">1275</p> <p>1 have to pay for their bandwidth, right?</p> <p>2 A Yes, they certainly do.</p> <p>3 Q And my Ms. Jones is paying a fee to Live</p> <p>4 that's covering the bandwidth costs, right?</p> <p>5 A I believe so, yes.</p> <p>6 Q So there are some ways in which Live is</p> <p>7 actually going to have lower costs than broadcasters,</p> <p>8 right?</p> <p>9 A You mentioned two category of costs. There's</p> <p>10 a host of many other costs.</p> <p>11 Q Now, there are other costs that terrestrial</p> <p>12 radio stations have that traditional webcasters do</p> <p>13 not, right?</p> <p>14 A Yes.</p> <p>15 Q In programming terms, for example, they tend</p> <p>16 to have DJs and local news and sports and traffic,</p> <p>17 right?</p> <p>18 A Many of them do, either -- they employ some</p> <p>19 traffic services and so on.</p> <p>20 Q Okay. And that on-air talent costs them</p> <p>21 money, right?</p> <p>22 A It certainly does.</p>	<p style="text-align: right;">1277</p> <p>1 Honor?</p> <p>2 (Discussion held off the record.)</p> <p>3 MR. HANDZO: Thank you, Your Honor. That's</p> <p>4 all I have.</p> <p>5 CHIEF JUDGE SLEDGE: Any further</p> <p>6 cross-examination?</p> <p>7 MR. MALONE: No, Your Honor.</p> <p>8 CHIEF JUDGE SLEDGE: Any redirect?</p> <p>9 MR. MacDONALD: Yes, Your Honor.</p> <p>10 REDIRECT EXAMINATION</p> <p>11 BY MR. MacDONALD:</p> <p>12 Q Good afternoon, Dr. Fratrik.</p> <p>13 A Good afternoon, Mr. MacDonald.</p> <p>14 Q Why didn't you use a benchmark?</p> <p>15 A I thought my approach was a much more</p> <p>16 straightforward way of valuing the copyrighted</p> <p>17 material.</p> <p>18 Q And why is that?</p> <p>19 A Because, as I described earlier today, I</p> <p>20 looked at the revenue minus the cost of a typical</p> <p>21 webcaster and, from that calculation, determined the</p> <p>22 value of the performance.</p>
<p style="text-align: right;">1276</p> <p>1 Q And the webcasters don't have that cost</p> <p>2 either, do they?</p> <p>3 A Well, the webcaster sometimes will be the DJ</p> <p>4 also.</p> <p>5 Q Live doesn't do that, does it?</p> <p>6 A Live doesn't do it.</p> <p>7 Q Okay. So if you compare Live to an</p> <p>8 over-the-air broadcaster, it doesn't have the on-air</p> <p>9 talent costs and so on that the broadcasters do?</p> <p>10 A Correct.</p> <p>11 Q You said you read some of the testimony in</p> <p>12 the Web II case; is that right?</p> <p>13 A Yes, I did.</p> <p>14 Q Did you read the testimony from the --</p> <p>15 presented by the radio broadcasters?</p> <p>16 A No, I don't think I did.</p> <p>17 Q Okay. Were you aware or did anyone tell you</p> <p>18 that in that case the radio broadcasters argued that</p> <p>19 they should pay a lower rate because of their higher</p> <p>20 costs?</p> <p>21 A I was not aware of that, no.</p> <p>22 MR. HANDZO: May I have 30 seconds, Your</p>	<p style="text-align: right;">1278</p> <p>1 Q Now, Dr. Fratrik, when a company is not</p> <p>2 making profits, do they ever undertake cost cutting</p> <p>3 measures?</p> <p>4 A Very often they do.</p> <p>5 Q Do companies ever renegotiate for lower</p> <p>6 salaries?</p> <p>7 A They try to, yes.</p> <p>8 Q Do companies renegotiate their contracts?</p> <p>9 A They go to some of their suppliers and ask</p> <p>10 for some relief, yes.</p> <p>11 Q Would these cost cutting measures make a</p> <p>12 difference on operating margins?</p> <p>13 A Oh, it could certainly do that.</p> <p>14 JUDGE WISNIEWSKI: Dr. Fratrik, can we take</p> <p>15 that and extend that to the terrestrial radio industry</p> <p>16 that you're familiar with?</p> <p>17 THE WITNESS: Yes.</p> <p>18 JUDGE WISNIEWSKI: A typical terrestrial</p> <p>19 radio company -- say one of these companies that</p> <p>20 you've got listed in your operating revenue that's on</p> <p>21 page 22 that operate any number of stations --</p> <p>22 THE WITNESS: Hundreds of them, yes.</p>

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1279	<p>1 JUDGE WISNIEWSKI: -- if they're not making a</p> <p>2 profit consistently off of one of those stations, what</p> <p>3 do they do with it?</p> <p>4 THE WITNESS: Well, very often they'll cut</p> <p>5 back on the staff, and that's what's been experienced</p> <p>6 in most recent years, cut down on some, I'll say,</p> <p>7 high-priced talent, and I'm not trying to be</p> <p>8 pejorative about that. They'll look at other ways of</p> <p>9 cutting costs.</p> <p>10 Unfortunately, the electricity cost to</p> <p>11 transmit a radio station you can't change. There are</p> <p>12 other -- they may lease out some of their building.</p> <p>13 There are many hosts of ideas in terms of -- they may</p> <p>14 cut back on promotion.</p> <p>15 JUDGE WISNIEWSKI: Might they dispose of the</p> <p>16 station?</p> <p>17 THE WITNESS: If things are that bleak, yes.</p> <p>18 I mean, what ends up happening, though, before they --</p> <p>19 well, when you say dispose of the station, you mean</p> <p>20 sell the station? Yes, very often they will sell the</p> <p>21 station before they even turn it off, although there</p> <p>22 have been some stations that have been shut off.</p>
1280	<p>1 JUDGE WISNIEWSKI: Might they change the</p> <p>2 format of the station?</p> <p>3 THE WITNESS: Oh, very often they'll try and</p> <p>4 do that to attract --</p> <p>5 JUDGE WISNIEWSKI: It's a fairly common</p> <p>6 thing?</p> <p>7 THE WITNESS: Very often, yes.</p> <p>8 JUDGE WISNIEWSKI: Thank you.</p> <p>9 CHIEF JUDGE SLEDGE: Some have even been bold</p> <p>10 enough to eliminate classical music programming.</p> <p>11 THE WITNESS: Yes, Your Honor, I know that oh</p> <p>12 so well, but what's encouraging is that a lot of</p> <p>13 terrestrial radio broadcasters are using their</p> <p>14 multicasting capabilities to expand the number of</p> <p>15 classical music formats.</p> <p>16 CHIEF JUDGE SLEDGE: That's only when you pay</p> <p>17 a subscription.</p> <p>18 THE WITNESS: Not necessarily. If you have</p> <p>19 what's called a high-definition radio, you can pick up</p> <p>20 the multicast signals.</p> <p>21 CHIEF JUDGE SLEDGE: You pay for that, too,</p> <p>22 don't you?</p>
1281	<p>1 THE WITNESS: Well, you only have to pay the</p> <p>2 one -- there isn't a subscription fee; it's just a</p> <p>3 one-time fee.</p> <p>4 CHIEF JUDGE SLEDGE: I digress, I'm sorry.</p> <p>5 THE WITNESS: No, it's what I know a lot</p> <p>6 about.</p> <p>7 BY MR. MacDONALD:</p> <p>8 Q Dr. Fratrik, have you provided a sensitivity</p> <p>9 analysis with your economic model?</p> <p>10 A Yes, in the various models -- and it's</p> <p>11 included in table 5 -- I use various operating margins</p> <p>12 to provide some sort of sensitivity analysis on the</p> <p>13 value of the copyrighted material assuming various</p> <p>14 operating margins.</p> <p>15 Q Turning to another subject, are you aware of</p> <p>16 any entities on the willing seller side that have</p> <p>17 entered into agreements with webcasters that have</p> <p>18 rates close to your recommended rate?</p> <p>19 MR. HANDZO: Objection, Your Honor. That's</p> <p>20 an attempt to get into non-precedential deals.</p> <p>21 CHIEF JUDGE SLEDGE: Mr. MacDonald?</p> <p>22 MR. MacDONALD: It does, I believe, Your</p>
1282	<p>1 Honor, go on the bounds of the pure play deal without</p> <p>2 getting into the rates.</p> <p>3 CHIEF JUDGE SLEDGE: The question is, have</p> <p>4 you considered other services?</p> <p>5 MR. MacDONALD: No, your Honor. It was</p> <p>6 whether he was aware.</p> <p>7 CHIEF JUDGE SLEDGE: Aware of other services.</p> <p>8 You can answer yes or no to that question.</p> <p>9 THE WITNESS: Yes.</p> <p>10 BY MR. MacDONALD:</p> <p>11 Q And, Dr. Fratrik, are you aware of any</p> <p>12 entities on the willing seller side that have agreed</p> <p>13 to a zero royalty rate?</p> <p>14 A No, I'm not aware of that. I pause because I</p> <p>15 don't remember exactly what the --</p> <p>16 CHIEF JUDGE SLEDGE: Just a moment. You'd</p> <p>17 better answer questions since you're in an area where</p> <p>18 your testimony may not be permitted.</p> <p>19 BY MR. MacDONALD:</p> <p>20 Q My question, Dr. Fratrik, is whether you're</p> <p>21 aware of any willing sellers who have waived their</p> <p>22 royalty rates?</p>

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<p style="text-align: right;">1283</p> <p>1 CHIEF JUDGE SLEDGE: No, sir, that wasn't 2 your question. That's a different question. 3 MR. MacDONALD: It was a -- Your Honor, 4 respectfully, it was a rephrasing of the question that 5 I -- 6 CHIEF JUDGE SLEDGE: Your last question was 7 any who have given a zero royalty rate. 8 MR. MacDONALD: Yes, that's correct, Your 9 Honor. 10 CHIEF JUDGE SLEDGE: That's very different 11 than your question after that. And that's already 12 been answered. 13 MR. MacDONALD: I'll move on, Your Honor. 14 CHIEF JUDGE SLEDGE: All right. 15 BY MR. MacDONALD: 16 Q Dr. Fratrik, are you setting a Live365 rate 17 or an industry-wide rate? 18 A I'm setting an industry-wide rate. 19 Q Under your rate proposal, Dr. Fratrik, will 20 every single webcaster earn a 20 percent margin? 21 A Not necessarily. 22 Q Are you assuming that some will earn more?</p>	<p style="text-align: right;">1285</p> <p>1 that Mr. Yacobian pass it out. 2 BY MR. MacDONALD: 3 Q Dr. Fratrik, is Live365's Exhibit 31 the 4 document you were just referring to? 5 A Yes, it is. 6 Q Do you recall where you saw those percentages 7 that you were just testifying about within Live365 8 Trial Exhibit 31? 9 A I believe it is in -- the first place you see 10 it is in appendix 2, page 2, where he specifies his 11 model. I'm trying to look and see if there's any 12 reference to it in the body of the paper also. 13 There is a reference to it on page 16 -- no, 14 not exactly the same reference. Excuse me. 15 He utilizes it in his model on page 2 in 16 appendix 2, chart C and chart D, where he solves for 17 operating margin in year 5 for various rate of 18 returns. 19 And I misspoke a little bit before, the -- 20 MR. HANDZO: Your Honor, I'm sorry to cut the 21 witness off, but I'm going to object to having him 22 essentially read parts of a document that are not in</p>
<p style="text-align: right;">1284</p> <p>1 A Some will earn more; some will earn less. 2 Q Dr. Fratrik, is your rate proposal applicable 3 to all webcasters or to typical commercial webcasters? 4 A As I said in my assumptions, it's commercial 5 webcasters that have both subscription and advertising 6 revenues as their sources of income. 7 Q Dr. Fratrik, have you ever come across any 8 studies that have indicated that a 20 percent 9 operating margin, or thereabouts, is appropriate for a 10 mature statutory webcaster? 11 A Yes. In the last few weeks, I came across a 12 study by a Dr. Nagle, who was an economic expert for 13 the RIAA in 2001 CARP proceeding to determine 14 appropriate royalty rate. And in his model, he has 15 a -- and he had the buildup model also in terms of 16 building up from various revenues and costs. He had 17 an assumption of a range of around 13.4 percent and 18 22.2 percent, I believe, for an operating margin for 19 what he called the mature webcaster, a webcaster that 20 had nine-plus years in the business. 21 MR. MacDONALD: Your Honor, I'd like to mark 22 for identification Live365 Trial Exhibit 31 and ask</p>	<p style="text-align: right;">1286</p> <p>1 evidence. 2 CHIEF JUDGE SLEDGE: Mr. MacDonald? 3 MR. MacDONALD: That's fine, Your Honor. I'd 4 like to ask him questions about his familiarity with 5 this particular report in an effort to allow him to 6 answer the question that I posed. 7 CHIEF JUDGE SLEDGE: Objection sustained. 8 BY MR. MacDONALD: 9 Q Dr. Fratrik, have you read this report? 10 A Yes, I have. 11 Q Are you familiar with its contents? 12 A Yes. 13 MR. MacDONALD: Your Honor, I move for 14 admission of Live365 Exhibit 31. 15 CHIEF JUDGE SLEDGE: Any objection to the 16 offer? 17 MR. HANDZO: Yes, Your Honor, on two bases. 18 First of all, this appears to be prior testimony from 19 the prior case, and we have a regulation here that 20 governs admitting prior testimony or designating prior 21 testimony. It's 37 CFR 351.4(b)(2). It says that if 22 you're going to designate prior testimony, you have to</p>

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1287	<p>1 include all of the testimony for -- direct, cross, 2 rebuttal. And I think this is a back-door attempt to 3 avoid that. So that's the first objection. 4 The second objection is that I think this is 5 improper redirect. I certainly did ask this witness 6 about his basis for coming up with a 20 percent 7 operating margin. It was based on what was in his 8 written report. We now have an improper attempt to 9 bolster his written report with evidence that he's 10 apparently tried to come up with after the fact. 11 I think I'm entitled to cross him on what he 12 put in his report without having to open the door to 13 new evidence that they've gone out and tried to find 14 that I never knew about before, that I didn't have a 15 chance to depose him about and that I'm now hearing 16 about for the first time. 17 CHIEF JUDGE SLEDGE: Mr. MacDonald? 18 MR. MacDONALD: With respect to rule 19 351.4(b)(2), that refers to the submission of written 20 direct statements that occurred back in 21 September 2009. And with respect to the -- Mr 22 Handzo's second statement, I think Mr. Handzo did</p>	1289	<p>1 Q Okay. And Warner Music -- well, that might 2 be Exhibit 36. But are there differences between 3 these companies and typical commercial webcasters as 4 you've used the term? 5 A Yes. Those four businesses represented in 6 Trial Exhibit 31 through 34 are all retail outlets. 7 They have inventory. They have other costs. They're 8 not in the business of attracting listeners and trying 9 to sell advertising with those listeners. 10 Q Do these companies have the same business 11 model? 12 A Certainly not. They're not selling 13 advertising. They have various cost structures. 14 Q What about warehousing costs? 15 A That's one of the costs that they -- that the 16 retailers may have. Overstock.com, just by its 17 nature, is overstocking warehousing products. 18 Amazon.com has warehouses with product. Whereas a 19 commercial webcaster does not have a warehouse. 20 Q I'd like to refer you to your table 1, 21 page 19 of your report, which has your table of 22 allocated costs. Now, do you recall that Mr. Handzo</p>
1288	<p>1 acknowledge that he inquired in-depth about the 2 20 percent operating margin, and he's certainly 3 entitled to recross on this exact exhibit. 4 CHIEF JUDGE SLEDGE: The objection on the 5 offer of the exhibit is sustained. 6 MR. MacDONALD: Thank you, Your Honor. 7 BY MR. MacDONALD: 8 Q Dr. Fratrik, do you recall the discussion 9 about SoundExchange Trial Exhibits 31, 32, 33 and 34, 10 which are the Yahoo! Finance pages with respect to 11 certain businesses? 12 A Yes. 13 Q Are you aware of any Internet businesses that 14 have higher than 20 percent operating margins? 15 A I believe that Google actually has somewhere 16 around a 35 percent operating margin. They're an 17 Internet business. 18 Q Now, going back to Exhibits 31, 32, 33 and 19 34, are there differences between these companies, 20 Amazon, 1-800-Flowers, bidz.com -- and I'm not sure I 21 have Exhibit 34. You might have it in front of you. 22 A Bidz.com.</p>	1290	<p>1 questioned you about certain documents that you relied 2 upon with respect to these cost allocations? 3 A Yes. 4 Q Did you talk to anybody at Live365 to verify 5 these cost allocations? 6 A I talked with Mr. Yue-Shen Ho about that. As 7 I mentioned, he's a financial consultant for Live365. 8 I talked with Mr. Lam about the nature of the business 9 as I mentioned in my deposition, and obviously the 10 cost structure. I talked to Mr. Floater about the 11 advertising revenues that are generated by Live365. 12 Q After talking to these individuals, were you 13 satisfied with the cost allocations that were 14 represented to you? 15 A Yes. 16 Q Dr. Fratrik, there were some questions about 17 the range between the Accustream ad revenue estimates 18 and the ZenithOptimedia ad revenue estimates. Do you 19 recall that discussion? 20 A Yes, I do. 21 Q Besides looking at Live365's numbers, did you 22 do anything else to verify whether this range was</p>

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1291	<p>1 reasonable?</p> <p>2 A Recently, Pandora reported that their</p> <p>3 revenues are approximately \$50 million and even if you</p> <p>4 account for those revenues being all</p> <p>5 advertising-supported, they have approximately</p> <p>6 50 percent of the aggregate tuning hours nowadays.</p> <p>7 And so if you use that \$50 million as a</p> <p>8 proxy, that -- then that total industry revenue number</p> <p>9 would be approximately a hundred million dollars.</p> <p>10 Q Did you rely upon Live365's costs for your</p> <p>11 economic model?</p> <p>12 A Yes, I did.</p> <p>13 Q Did you have industry-wide data for</p> <p>14 webcasting costs?</p> <p>15 A I did not have industry-wide data, no.</p> <p>16 Q Did you rely upon Live365's subscription</p> <p>17 revenues for your economic model?</p> <p>18 A Yes, I did.</p> <p>19 Q Did you have industry-wide data for the</p> <p>20 webcasting industry related to subscription revenues?</p> <p>21 A I had data during -- that were presented --</p> <p>22 provided during discovery about the average subscriber</p>
1292	<p>1 cost as well as the average number of hours that a</p> <p>2 subscriber utilizes a particular service.</p> <p>3 Q For ad revenues for the industry, did you</p> <p>4 rely upon Live365 to calculate the industry-wide ad</p> <p>5 revenue estimates?</p> <p>6 A No, I did not.</p> <p>7 Q Did you have industry-wide data for the ad</p> <p>8 revenue estimates?</p> <p>9 A Yes, I did.</p> <p>10 Q Did you use the industry-wide data for the ad</p> <p>11 revenue estimates because Live365's ad revenues were</p> <p>12 atypical?</p> <p>13 MR. HANDZO: Objection. Leading.</p> <p>14 CHIEF JUDGE SLEDGE: Sustained.</p> <p>15 BY MR. MacDONALD:</p> <p>16 Q Dr. Fratrik, why did you use the</p> <p>17 industry-wide data for the ad revenues in your model?</p> <p>18 A I wanted to have an independent source so as</p> <p>19 to come up with this proposed royalty payment that I'm</p> <p>20 suggesting.</p> <p>21 Q Dr. Fratrik, by not using Live365's ad</p> <p>22 revenues for your economic model in table 5 and</p>
1293	<p>1 instead using industry-wide data from ZenithOptimedia,</p> <p>2 is your recommended royalty rate lower or higher than</p> <p>3 what would be computed using Live365's numbers in</p> <p>4 table 5?</p> <p>5 A The recommended royalty rate is higher.</p> <p>6 Q Now, I think you testified about including</p> <p>7 simulcasting revenues in your revenues estimates. Do</p> <p>8 you recall that discussion?</p> <p>9 A In total industry advertising revenue? Yes.</p> <p>10 Q Correct. Now, by including simulcasting</p> <p>11 revenues, how does that affect your revenue estimates?</p> <p>12 A If you assume that local broadcasters can do</p> <p>13 a better job in generating revenues per aggregate</p> <p>14 tuning hour or advertising revenues, then that</p> <p>15 actually increases the total amount of advertising</p> <p>16 revenues generated by webcasting.</p> <p>17 JUDGE WISNIEWSKI: Could you repeat that,</p> <p>18 Dr. Fratrik?</p> <p>19 THE WITNESS: If you include -- if you</p> <p>20 believe, as I do, that local broadcasters of</p> <p>21 simulcasts can do a better job in generating</p> <p>22 advertising revenues per aggregate tuning hour, then</p>
1294	<p>1 having them in the total industry number raises the</p> <p>2 average than it would have been otherwise if all you</p> <p>3 were looking at are just commercial webcasters.</p> <p>4 JUDGE WISNIEWSKI: Thank you.</p> <p>5 BY MR. MacDONALD:</p> <p>6 Q Does including the simulcaster information in</p> <p>7 your economic model affect your cost calculations?</p> <p>8 A No, it does not.</p> <p>9 Q And by including simulcasters revenue in your</p> <p>10 economic model, does it make your computed royalty --</p> <p>11 computed royalty rates higher or lower?</p> <p>12 A It would make it higher.</p> <p>13 Q Now, I believe Mr. Handzo asked you questions</p> <p>14 about whether you knew the cost structures for a</p> <p>15 customizer service that has an interactive component.</p> <p>16 Do you recall that testimony?</p> <p>17 A Yes, I do.</p> <p>18 Q Do you know those cost structures?</p> <p>19 A No, I do not.</p> <p>20 Q Do you know the revenue structures?</p> <p>21 A No, I don't.</p> <p>22 Q Do you know their operating margins?</p>

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<p style="text-align: right;">1295</p> <p>1 A No, I do not. 2 Q Would you want to know? 3 A I would say more information is better than 4 less. It would give me a better sense of the 5 webcasting industry. 6 Q Now, Mr. Handzo asked you about listenership 7 levels from the JPMorgan report being higher if you 8 include the pure play and the simulcasters. Do you 9 recall that discussion? 10 A Yes. 11 Q Have you done any analysis of what the 12 listenership levels look like if one of the top 13 webcasters were excluded from those listenership data? 14 A Yes. I looked at some data that was 15 presented during the discovery process of the top 25 16 webcasters, which I think constituted 97 percent of 17 all aggregate tuning hours, and if you take out the 18 number one webcaster, which is Pandora, then the 19 actual -- the remaining 24 don't show an increase. It 20 actually decreases over the last few years. 21 Q Do you recall, Dr. Fratrik, the discussions 22 about ZenithOptimedia's estimates for 2011 being at</p>	<p style="text-align: right;">1297</p> <p>1 more time. Now, the ZenithOptimedia has a 2 \$291 million estimate for 2011, correct? 3 A From their July 2009 estimate that I include 4 in my -- at one of my exhibits, yes. 5 Q And is that an increase from the 2008 6 estimates that you provided in your model? 7 A The 291 is higher than the 200 for 2008, yes. 8 Q Is there anything else that's projected to 9 increase between 2008 and 2011 that would impact 10 revenue per ATH? 11 A I would imagine as more commercial 12 broadcasters do simulcasting and get better at it, 13 that they may be able to generate higher revenues for 14 their webcasting services. That's the only thing I 15 can think of right now. 16 Q That's fine. 17 Let's talk about promotion for a bit. Do you 18 recall the discussion about Live365's \$1.3 million in 19 sales of music downloads and CDs that it has generated 20 over the past several years? 21 A Yes, I do. 22 Q Are you aware of the approximate figure in</p>
<p style="text-align: right;">1296</p> <p>1 291 million? 2 A Yes. That was in their July 2009 report. 3 Q First of all, Dr. Fratrik, do you know 4 whether that \$291 million figure has been adjusted 5 downward? 6 A I believe that they did adjust it downward in 7 their -- I believe they came out with a December 2009 8 update. I think they do it twice a year. That number 9 is lower. 10 Q Is there anything else that's projected to go 11 up over the next year or two that may affect the 12 revenue per ATH -- that affects revenue per ATH as 13 compared to the ZenithOptimedia \$291 million estimate 14 of revenues? 15 A Are you asking me is there any reason that I 16 suspect advertising revenues for Internet webcasting 17 to increase? 18 Q Yes. 19 JUDGE WISNIEWSKI: I wouldn't have got that 20 from that question. 21 BY MR. MacDONALD: 22 Q That was a bad question. Let me try it one</p>	<p style="text-align: right;">1298</p> <p>1 dollars of what Pandora has generated per month in 2 music sales and downloads? 3 A I pause because I recall seeing that number, 4 but I don't -- off the top of my head, I can't recall. 5 Q Does \$1 million a month ring a bell to you? 6 A I think that was close to that number, yes. 7 Q I'd like to turn your attention to the rate 8 proposal, and I'd like to mark that for identification 9 as Live365 Trial Exhibit 32. 10 First of all, Dr. Fratrik, have you ever seen 11 Live365's rate proposal before? 12 A Yes. 13 Q Turning your attention to the definition 14 section on page 2, you recall that there was a 15 discussion earlier on during your cross-examination 16 about the amount of webcasting -- webcasters that 17 needed to be operated under a webcast network to 18 qualify as a webcasting -- as an aggregation service, 19 essentially? 20 A Yes. 21 Q And how much was that? 22 A A hundred.</p>

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1299	<p>1 Q Turning your attention to that webcast</p> <p>2 aggregation service, do you see that part of the</p> <p>3 definition includes "independently operated"?</p> <p>4 A Yes.</p> <p>5 Q Do you see that?</p> <p>6 A Yes, do I see that.</p> <p>7 Q Is there a distinction between terrestrial</p> <p>8 broadcasters who may have a hundred stations versus an</p> <p>9 aggregation service that is -- a webcast aggregation</p> <p>10 service as defined by this rate proposal?</p> <p>11 A The broadcasters that are simulcasting and</p> <p>12 may have over a hundred are not independently operated</p> <p>13 aggregated webcasters. They are commonly owned, so</p> <p>14 commonly operated.</p> <p>15 Q And is there a different definition provided</p> <p>16 under the webcast aggregation service definition as</p> <p>17 compared to how you just described terrestrial</p> <p>18 broadcasters?</p> <p>19 A Right. The webcast aggregation service under</p> <p>20 this definition within the proposal from Live365 would</p> <p>21 be independently operated aggregated webcasters. The</p> <p>22 Ms. Jones, Mr. Jones -- and I forget the names -- that</p>	1301	<p>1 JUDGE WISNIEWSKI: -- in your model? I</p> <p>2 thought your model was based on Live365's costs.</p> <p>3 THE WITNESS: Right. And Live365 does not</p> <p>4 have programming costs.</p> <p>5 JUDGE WISNIEWSKI: Right.</p> <p>6 THE WITNESS: What Mr. MacDonald asked me was</p> <p>7 whether or not a typical webcaster have programming</p> <p>8 costs --</p> <p>9 JUDGE WISNIEWSKI: That's not the typical</p> <p>10 webcaster that you've got in your model?</p> <p>11 THE WITNESS: That's correct.</p> <p>12 JUDGE WISNIEWSKI: Okay. Thank you. We now</p> <p>13 have a new typical webcaster.</p> <p>14 BY MR. MacDONALD:</p> <p>15 Q Dr. Fratrik, are you familiar with the term</p> <p>16 "price discrimination"?</p> <p>17 A Yes.</p> <p>18 Q Does price discrimination occur in the</p> <p>19 interactive versus non-interactive webcasting markets?</p> <p>20 A Yes.</p> <p>21 Q Does price discrimination have any</p> <p>22 significance to interactive or -- to interactive</p>
1300	<p>1 Mr. Handzo was referring to --</p> <p>2 Q Mr. Smith?</p> <p>3 A Mr. Smith and Ms. Jones webcasters as opposed</p> <p>4 to the example of a radio group that owns -- that had</p> <p>5 stations that have over a hundred, because they're</p> <p>6 commonly operated -- that would be a distinction noted</p> <p>7 in this webcast aggregation service definition.</p> <p>8 Q Dr. Fratrik, do you recall your testimony</p> <p>9 about Live365 not having programming costs?</p> <p>10 A Yes.</p> <p>11 Q Does the typical commercial webcaster in your</p> <p>12 model have programming costs?</p> <p>13 A Some programming costs.</p> <p>14 Q Does the broadcast simulcasters have</p> <p>15 programming costs for his simulcast?</p> <p>16 A Not if it's -- by definition, if it's</p> <p>17 simulcasting, there's no additional programming cost.</p> <p>18 JUDGE WISNIEWSKI: Can we back up a step</p> <p>19 here? What was the answer to the previous question?</p> <p>20 Could you tell me what programming costs you're</p> <p>21 talking about --</p> <p>22 THE WITNESS: Well, the --</p>	1302	<p>1 royalties being priced higher?</p> <p>2 A Yes, because the interactive webcasters can</p> <p>3 generate greater revenues and, thus, would be willing</p> <p>4 to pay more for the copyrighted materials.</p> <p>5 Q Does the amount of royalty paid by a service</p> <p>6 make any difference to a listener?</p> <p>7 A If the royalty payments were less, there may</p> <p>8 actually be more webcasters out there and so there may</p> <p>9 be more listeners.</p> <p>10 Q But Does the royalty rate decide whether a</p> <p>11 listener will listen to a simulcaster or a pure play</p> <p>12 webcaster?</p> <p>13 A Absolutely not.</p> <p>14 Q Can a seller price discriminate between</p> <p>15 simulcasters and pure play webcasters in the royalty</p> <p>16 market for non-interactive webcasting?</p> <p>17 A Yes, I believe it could.</p> <p>18 MR. MacDONALD: Your Honor, may I have a few</p> <p>19 minutes to confer with my co-counsel? I think I'm</p> <p>20 almost done.</p> <p>21 CHIEF JUDGE SLEDGE: Well, you have extended</p> <p>22 beyond our closing time by six minutes without</p>

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<p>1 addressing that. I assumed you were through.</p> <p>2 MR. MacDONALD: I believe I'm almost through,</p> <p>3 Your Honor.</p> <p>4 CHIEF JUDGE SLEDGE: I'll give you a few</p> <p>5 seconds.</p> <p>6 (Discussion held off the record.)</p> <p>7 MR. MacDONALD: Your Honor, I'm done, and I</p> <p>8 apologize for taking seven extra minutes of the</p> <p>9 court's time.</p> <p>10 CHIEF JUDGE SLEDGE: All right.</p> <p>11 Any further cross based on that redirect?</p> <p>12 MR. HANDZO: Two questions, Your Honor.</p> <p>13 CHIEF JUDGE SLEDGE: All right.</p> <p>14 RECROSS EXAMINATION</p> <p>15 BY MR. HANDZO:</p> <p>16 Q Dr. Fratrik, you told Mr. MacDonald that you</p> <p>17 discussed your cost allocations with Mr. Ho and</p> <p>18 Mr. Lam. Do you recall that?</p> <p>19 A Yes.</p> <p>20 Q Who made the cost allocations, you or them?</p> <p>21 A I did.</p> <p>22 Q And that was based on the information we</p>	<p>1 CHIEF JUDGE SLEDGE: You don't know if she</p> <p>2 boarded or anything?</p> <p>3 MR. OXENFORD: We thought that -- our</p> <p>4 understanding is that she has boarded during our lunch</p> <p>5 break.</p> <p>6 CHIEF JUDGE SLEDGE: We'll recess until 9:30.</p> <p>7 (Whereupon, the hearing adjourned at</p> <p>8 4:40 p.m., to reconvene at 9:30 a.m., Wednesday,</p> <p>9 April 28, 2010.)</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>
1304	1306
<p>1 discussed earlier that you got from them, correct,</p> <p>2 financial documents?</p> <p>3 A And my discussing it with them, yes.</p> <p>4 MR. HANDZO: That's all I have.</p> <p>5 CHIEF JUDGE SLEDGE: Questions from the</p> <p>6 bench?</p> <p>7 JUDGE WISNIEWSKI: I just have one.</p> <p>8 Mr. MacDonald was just asking you about this</p> <p>9 definition in the proposal which references something</p> <p>10 called independently operated aggregated webcasters.</p> <p>11 Does this, to your knowledge, mean that each of these</p> <p>12 webcasters are commercial webcasters?</p> <p>13 THE WITNESS: No, not at all.</p> <p>14 JUDGE WISNIEWSKI: Thank you.</p> <p>15 CHIEF JUDGE SLEDGE: All right. Thank you,</p> <p>16 sir. You're excused.</p> <p>17 (Witness excused.)</p> <p>18 CHIEF JUDGE SLEDGE: Live365 will have its</p> <p>19 last witness at 9:30 in the morning.</p> <p>20 MR. OXENFORD: As far as we know, Your Honor,</p> <p>21 she's on her way. When we last checked she was at the</p> <p>22 airport, flying here.</p>	<p>1 CERTIFICATE OF COURT REPORTER</p> <p>2</p> <p>3 I, Denise M. Brunet, the court reporter</p> <p>4 before whom the foregoing proceedings were taken, do</p> <p>5 hereby certify that the proceedings were taken by me</p> <p>6 stenographically and thereafter reduced to print by</p> <p>7 means of computer-assisted transcription by me; that</p> <p>8 said proceedings are a true record; that I am neither</p> <p>9 counsel for, related to, nor employed by any of the</p> <p>10 parties to this litigation and have no interest,</p> <p>11 financial or otherwise, in the outcome of this matter.</p> <p>12</p> <p>13</p> <p>14 _____</p> <p>15 Denise M. Brunet</p> <p>16 Court Reporter</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>

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1 CERTIFICATE OF COURT REPORTER

2

3 I, Denise M. Brunet, the court reporter

4 before whom the foregoing proceedings were taken, do

5 hereby certify that the proceedings were taken by me

6 stenographically and thereafter reduced to print by

7 means of computer-assisted transcription by me; that

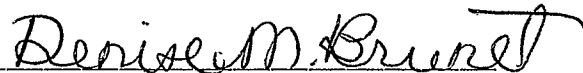
8 said proceedings are a true record; that I am neither

9 counsel for, related to, nor employed by any of the

10 parties to this litigation and have no interest,

11 financial or otherwise, in the outcome of this matter.

12

13 

14 Denise M. Brunet

15 Court Reporter

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